Petition

81-1555

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF ALLEN PARK,
Petitioner,
vs.
STATE OF MICHIGAN, THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GREENFIELD CONSTRUCTION COMPANY, INC., LANZO CONSTRUCTION COMPANY, INC., GIANNETTI CONSTRUCTION OF MICHIGAN, INC., ROCCO FERRERA & COMPANY, INC., ROBERT LINCICH AND BILL SERPETTI, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. IN THIS FIRST IMPRESSION STATUTORY INTERPRETATION WHICH HELD DEFENDANT MUNICIPALITY TO A DISCHARGER PERMIT REQUIREMENT UNDER THE FEDERAL WATER POLLUTION CONTROL ACT [§ 301(a) and § 402], WAS THE LOWER COURT BOUND TO GIVE DEFERENCE TO EPA'S OWN AGENCY INTERPRETATION OF CONGRESSIONAL INTENT THAT A MUNICIPALITY SUCH AS DEFENDANT, TIED TO A MUNICIPAL TREATMENT PLANT, IS NOT A "DISCHARGER" WITHIN THE MEANING OF THE ACT AND THEREFORE SHOULD NOT HAVE BEEN SUBJECTED TO NPDES PERMIT REQUIREMENTS?

2. WHERE THE ENVIRONMENTAL PROTECTION AGENCY DID GENERATE SOME ADMINISTRATIVE RECORD IN MAKING A WATER POLLUTION CONTROL ACT CONSTRUCTION GRANT AWARD, WAS IT ERROR FOR THE LOWER COURTS TO SUSTAIN SUCH ADMINISTRATIVE ACTION AS NOT ARBITRARY WHILE DENYING ADMISSION OF THE ADMINISTRATIVE RECORD AND REFUSING TO REVIEW THE AGENCY'S REASONS AND BASIS FOR ITS ACTIONS?

3. IN A FEDERAL WATER POLLUTION CONTROL ACT ENFORCEMENT PROCEEDING WHERE DEFENDANT CHALLENGED THE SEWER CONSTRUCTION PLAN AS ARBITRARY AND CAPRICIOUS AND PROFERRED EVIDENCE THAT THE PLAN WAS FATALLY DEFECTIVE, WAS BASED ON IMPROPER SCIENTIFIC ANALYSIS AND WAS DANGEROUS TO THE PUBLIC, WAS THE COURT IN ERROR RULING SUCH EVIDENCE "NON-PROBATIVE" WITHIN THE MEANING OF FEDERAL RULES OF EVIDENCE, RULE 401 AND WAS THE EXCLUSION OF SUCH EVIDENCE THEREFORE IN VIOLATION OF FEDERAL RULES OF EVIDENCE, RULE 402 PERMITTING INTRODUCTION OF ALL RELEVANT EVIDENCE?

4. IN A 60 MILLON DOLLAR FEDERALLY FUNDED SEWER PROJECT, SHOULD THE "HARD LOOK" REQUIREMENT OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 [42 USC § 4321] AND CONSIDERATIONS OF PUBLIC POLICY REQUIRE AN AFFIRMATIVE RECORD BEFORE THE DEFENSE OF LACHES CAN BE APPLIED TO PREVENT A LITIGANT FROM CHALLENGING THE ENVIRONMENTAL PROTECTION AGENCY'S FAILURE TO COMPLY WITH ITS ENVIRONMENTAL REVIEW AND PUBLIC DISCLOSURE REQUIREMENTS MANDATED BY CONGRESS UNDER THE ACT?

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CITATION TO THE OPINIONS BELOW

The decision of the trial court was reported at 501 F. Supp. 1007 (1980) (A. 13)*. The decision of the Sixth Circuit Court of Appeals has not been reported.

JURISDICTION

The Judgment of the District Court for the Eastern District of Michigan, Southern Division was entered on July 1, 1980, at 8:50 a.m. (A. 7). The Sixth Circuit Court of Appeals affirmed the trial court on October 8, 1981 (A. 10), and the Sixth Circuit Court of Appeals denied a timely Petition for Rehearing and Rehearing *en banc* on November 23, 1981 (A. 9). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The City of Allen Park, Petitioner herein, seeks to escape from a proposed federally funded sewer construction project costing approximately 60 million dollars. Petitioner has attempted to demonstrate that the project would cause severe damage within the City, is not based on accurate scientific criteria and is unjustifiably expensive. The cost of the project is to be

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* The symbol "A." refers to the Appendix attached hereto.

borne 75% by a United States Environmental Protection Agency (EPA) grant award, 5% by the State of Michigan, and 20% by local government of which Allen Park's apportioned share would equal 91% or approximately 11 million dollars (A. 142). There are only some 40,000 citizens in Allen Park of whom approximately one-third are senior citizens on fixed income. Petitioner attempted to escape the burden of this project by demonstrating the project's defects and the fact that the project received only cursory review at best by EPA which relied upon the financially interested private consultants.

Petitioner refers to the Opinion of the trial court under "Background" (A. 13-20) for a general overview of the facts leading to this dispute.

Allen Park is a Michigan municipal corporation located generally in the Detroit Metropolitan Area. The majority of the City of Allen Park utilizes a combined sewer system wherein a single sewer system carries both sanitary and storm flows. All combined flows from the City of Allen Park flow through various laterals to the LeBlanc Drain — a large drain owned and operated by the LeBlanc Tile Drainage District, itself a separate Michigan governmental corporation (A. 170) The LeBlanc Drain is connected to the Wyandotte Waste Water Treatment Plant, a waste water treatment facility owned and operated by the Wayne County Department of Public Works (A. 22, 164, 165) The connection from the LeBlanc Drain to the Wyandotte Treatment Plant is through an interceptor which intercepts the LeBlanc Drain. When the interceptor cannot handle the flows at any given time, the waters within the LeBlanc Drain will gradually rise until at some point these waters will bypass into the north branch of the Ecorse Creek (A. 73, 74). This by-pass occurs when the water levels inside the drain exceed the water levels in the north branch of the Ecorse Creek causing two large wooden gates to open (A. 74-77) There have never been any studies as to relative levels within the drain and the creek (A. 79, 80), nor any

monitoring or metering of actual discharge frequencies or quantity through the wooden gates (A. 106, 107, 166, 167).

The facility planning efforts to eliminate discharges or by-passes into the north branch of the Ecorse Creek culminated in the document known as the Ecorse Creek Pollution Abatement Project, Element II, Final Facility Plan which was introduced at trial as Plaintiff's Exhibit 2. That Facility Plan estimated construction costs for the Allen Park segment at approximately $17,000,000 (A. 145). Actual bids received for Contracts 1 through 5, being the actual sewer portion of the Allen Park segment were $37,809,198 (A. 145). Estimated construction costs for all contracts within the Allen Park segment now are given approximately $45,479,198 (A. 141a). Actual project costs were estimated to be construction costs plus approximately 30% for overhead, administrative, engineering and contingencies (A. 146) for a total cost of approximately $60,000,000.

The chosen alternative of the Element II Facility Plan which was ordered implemented by the trial court consists of sewer separation in approximately two-thirds of the City of Allen Park. The construction drawings and contract specifications show several construction problems including the necessity for contractors to do deep trenching and tunneling in narrow easements (A. 129) in close proximity to existing structures, including homes and garages (A. 171-176). There is, of course, a considerable likelihood of settling or vibration damage to these foundations. In addition, streets must be torn up for a period for two or more years. The very nature of the construction contracts is that all five sewer installation contracts, as well as the yet-to-be located* retention basin, must be constructed and completed

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* The integral function of the proposed retention basin is set forth in the trial court's opinon (A. 15, 16). No site has yet been approved and a Step One E.P.A. grant application is only pending.

simultaneously since none can work until the entire system becomes operational (A. 116, 117, 140, 141, 146, 147). Therefore, each contractor must first install the new sewer line and only after completion of all six contracts, may the contractor go back and hook up individual businesses and residences (A. 171). There is no protection afforded the citizens of Allen Park other than the liability coverage of the individual contractors (A. 142, 143).

The 75% federal funding is pursuant to Section 201 of the Water Pollution Control Act [33 USC § 1281]. Pursuant to Section 511(c)(1) of the Act [33 U.S.C. § 1371(c)(1)], and the National Environmental Policy Act of 1969 [42 U.S.C. § 4321] EPA initiated a process for NEPA compliance. On or about March 14, 1977, EPA issued an Environmental Impact Appraisal and Negative Declaration finding only a potential for "nuisance to residents for a short time." (See counterclaim of *Allen Park* v. *EPA* and attachments (A. 49-68). EPA determined no significant environmental impacts which would warrant an Environmental Impact Statement.

At the time of trial, Allen Park, through its counterclaim* against the Environmental Protection Agency, challenged the sufficiency of the environmental review process under NEPA. The trial court ruled that this Cross-Claim was barred by laches (A. 102, 103) and would allow no testimony (A. 102). At the time of trial no contracts within the City of Allen Park had yet been amended, nor had any construction commenced within the City of Allen Park.

Suit was initiated by Plaintiff-contractors on or about December 12, 1979 (see Journal of Docket Entries) (A. 1).

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* Allen Park initially filed a cross-claim against EPA which had been a defendant in this action but was realigned by the trial court as a party plaintiff pursuant to Rule 21 of the Federal Rules of Civil Procedure. Upon time of realignment the cross-claim became a counterclaim.

A sequential suit, apparently simultaneously initiated by individual Allen Park residents, was likewise commenced on the same date and the two suits were consolidated on or about February 21, 1980. Answer was filed on behalf of the Wayne County Drain Commissioner on or about January 3, 1980, and on that same date Defendant, Allen Park, likewise filed its Answer and Affirmative Defenses. Defendants, LeBlanc Tile Drain District and the Drainage District for Ecorse Creek Pollution Abatement Project, filed their respective Answers on or about March 5, 1980. Defendant, Wayne County, filed its Answer on or about March 17, 1980. On or about March 24, 1980, then Defendant, State of Michigan Department of Natural Resources (DNR), filed its Answer and the Answer of the United Sates Environmental Protection Agency was filed on or about April 2, 1980. Immediately upon the filing of these Answers, the parties began preparation for a pretrial conference, scheduled for April 8, 1980. Trial of this cause commenced on April 15, 1980, at which time Defendants, EPA and DNR, were realigned as plaintiffs pursuant to Order of the trial court (A. 69).

A good deal of confusion ensued at trial as to the permissible scope and parameters of examination and cross-examination. Petitioner proffered testimony which went to the arbitrariness of the Facility Plan and other relevant and probative proofs (A. 87-101 and Argument II, *infra*). The court ruled that it would not permit the proofs (A. 102) and further ruled that the court would allow no inquiry with regard to those matters raised in the proffered proofs (A. 102). The proferred proofs are preserved for review by Petitioner's offers of proof at trial.

The court further ruled that Allen Park's Counterclaim against EPA for NEPA violation was barred by laches and that no proofs would be allowed with regard to those NEPA claims.

At the conclusion of the non-jury trial, the Court issued its Final Order and Judgment directing Allen Park to "participate" in the Element II Final Facility Plan implementation. Subsequently, the Court, on November 6, 1980, filed its Opinion supplementing its previously entered Order and Judgment

Allen Park appealed as of right to the Sixth Circuit Court of Appeals which affirmed *per curiam* by order dated October 8, 1981 (A. 10) and denied Allen Park's Petition for Rehearing and Suggestion for Hearing En Banc by Order dated November 23, 1981 (A. 9).

REASONS FOR GRANTING THE WRIT

This cases raises substantial questions both under the Federal Water Pollution Control Act (33 U.S.C. § 1251, *et seq*) and under the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq*).

By holding Petitioner subject to a discharge permit requirement, the framework of modern federalism is threatened. Without clarification by this High Court, any municipality can find itself in financial jeopardy even though it may be considerably upstream of an offending wastewater treatment plan. Further, without clarification by the granting of this Writ, bench and bar alike will be uncertain as to the need to review an administrative agency's record in the judicial review of the agency's conclusions. Petitioner was the victim of *post hoc* reasoning by the trial court of the worst sort.

The grant of this Writ will benefit the fair administration of justice and in particular the judicial review of federal agency actions by clarification of Federal Rules of Evidence, Rules 401 and 402 as these rules apply to the arbitrariness of agency action. Petitioner was unduly circumscribed in its efforts to put in proofs through a narrow interpretation of "probative" and "relevant" by

the trial court. The lower court's rulings will generate confusion in future administrative review cases.

Review of this cause will assist bench and bar in all future cases under NEPA by clarifying the doctrine of laches in such cases and the extent to which a federal agency may escape its statutory duties because a challenger, such as Petitioner, did not have sufficient information or knowledge to make a more timely challenge.

1. THE LOWER COURTS FAILED TO GIVE EFFECT TO THE INTENT OF CONGRESS THAT A MUNICIPALITY SUCH AS PETITIONER, WHICH IS CONNECTED TO A MUNICIPAL SEWAGE TREATMENT PLANT, IS NOT A "DISCHARGER" UNDER THE FEDERAL WATER POLLUTION CONTROL ACT NOR SUBJECT TO A DISCHARGER PERMIT UNDER SECTION 402 OF THE ACT [33 U.S.C. § 1342].

The trial court record is clear beyond controversy that the permit ordered enforced by the trial court was issued to the Wayne County Drain Commissioner on behalf of the LeBlanc Tile Drain District (A. 69-71). It is clear that the LeBlanc Tile Drain District is a public body corporate under the organizational drain laws of the State of Michigan (A. 170-171). Petitioner, City of Allen Park, was not and cannot legally be deemed a permittee under the Water Pollution Control Act and cannot be subject to discharger enforcement pursuant to § 402 (33 U.S.C. § 1342). Allen Park exercises no jurisdiction or control over the discharge gates, the regulator chamber, the River Drive Interceptor, or the Wyandotte Treatment Plant (A. 119, 120, 164, 165).

Allen Park's situation in this case is directly analogous to that of the Maryland DNR and certain other Maryland defendants in *Montgomery Environmental Coalition* v.

Fri, 366 F. Supp. 261 (USDC, D.C., 1973). Motions to dismiss for failure to state a claim were granted as to those defendants which, like Allen Park, exercise no jurisdiction or control over the municipal treatment facilities. At 366 F. Supp., p. 267, the court found:

> "A claim capable of relief has not been stated as to the Department of Natural Resources for the State of Maryland since the pleadings indicate no authority on the part of this defendant to control the actual discharge of pollutants from Blue Plains other than to provide for water treatment facilities in Maryland. The power of defendant to enter into contracts for water treatment services can obviously alleviate water pollution but said power can not order cessation under a court mandate."

The portion of the City of Allen Park contemplated within the sewer project utilizes a combined sewer system in which both storm and sanitary wastes are collected and drained to the LeBlanc Drain, a public drain under the ownership and jurisdiction of the LeBlanc Tile Drainage District, a Michigan public corporation. The LeBlanc Drain is subsequently connected through a so-called junction chamber to the River Drive Interceptor which is part of the facility feeding into the Wyandotte Waste Water Treatment Plant, a municipal treatment facility owned and operated by the County of Wayne, Department of Public Works (A. 80, 81, 114, 164, 165). There is no evidence in this record to even suggest that the City of Allen Park wilfully, wantonly, or intentionally caused any discharge or bypass to the north branch of the Ecorse Creek. The evidence can only lead to the conclusion that the circumstances giving rise to a bypass or discharge are totally beyond the manipulation and/or control of Allen Park.

The City of Allen Park, as a matter of law, is not a "discharger" within the meaning of the Federal Water

Pollution Control Act, as amended, being 33 U.S.C. § 1251, et seq. Allen Park does not "discharge" within the meaning of said Act and, indeed, the proofs clearly showed that the City of Allen Park's effluent flows to the LeBlanc Drain, then to the River Drive Interceptor, then to the Wyandotte Waste Water Treatment Plant, all of which constitute municipal treatment works within the meaning of the Act, and in particular within the meaning of Sections 212 and 502 of said Act (33 U.S.C. § 1292 and 33 U.S.C. § 1362, respectively).

The trial court apparently found Allen Park to be an illegal discharger into the north branch of the Ecorse Creek through violation of NPDES Permit No. MI-0026204 (A. 30). Although the language of the trial court is ambiguous (using the plural "defendants" in addressing permit violation) Allen Park is obviously meant to be included. Such inclusion is further borne out by Michigan DNR's position statement at trial that the intent is to capture a point source discharge, being Outfall 001 of the LeBlanc Drain (A. 107-109).

Likewise, the Court of Appeals, in its brief *per curiam* Opinion, held that this case involved a question of permit violation by Allen Park (A. 10).

The original Senate version of the Federal Water Pollution Control Act included within the meaning of the term "discharge" the addition of any pollution to publicly owned treatment works. However, the final version of the Act, as adopted in conference, eliminated the contributor to a publicly owned treatment works as a discharger, both within the meaning of Section 502 (33 U.S.C. § 1362) and within the permit requirements of Section 402 (33 U.S.C. § 1342). Instead, contributors to a municipal treatment system, such as Petitioner, City of Allen Park, may be subject only to certain pretreatment requirements for which there is no supporting evidence of any kind within the record.

See *e.g.* 33 USC §§ 1311(b)(1)(A)(ii), 1311(b)(2)(A)(ii), 1317(b) and 1317(c).

The conclusion that Allen Park is not a "discharger" subject to National Pollution Discharge Elimination System (NPDES) permit requirements is further demonstrated in an opinion of the Environmental Protection Agency's general counsel, dated June 11, 1976, and designated *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36 (M), No. 43*. The EPA's own interpretation clearly indicates the error by the trial court in apparently finding Allen Park to be a violating discharger. This Agency interpretation should be accorded precedential deference. As this Court has recently observed in *Environmental Protection Agency* v *National Crushed Stone Association*, 449 U.S. 64 (1980):

> "It is by now a common place that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration'." (citation omitted) (449 U.S., at p. 83-84)

The Agency interpretation was that an industrial user of a *privately* owned wastewater treatment plant (part of an industrial park development) was a "discharger" within the meaning of the FWPCA subject to joint liability for § 301 compliance. The Agency distinguished between users of privately owned treatment plants and users of *publicly owned* treatment plants — that the former are within § 301 and § 402, while the latter are not. The Agency opinion goes on to state in relevant portion:

> "Friendswood's [the owner of the private treatment plant] customers argue that they are in a position analogous to that of industrial contributors to publicly owned treatment works. Analysis of the FWPCA and its legislative history

makes it clear that contributors to public owned works are not subject to § 301(a) and related provisions and need no § 401 discharge permit. Instead, these sources are subject to pretreatment requirements pursuant to sections 301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 307(b) and 307(c) and to certain provisions of § 402(b). The Senate Bill had defined the term 'discharge' in a manner similar to the present language of § 502(12) but had also included 'any addition of any pollution to publicly owned treatment works . . . by an industrial user. . .' The Senate Bill had also provided specifically in § 402 that permits were to be required for users of publicly owned treatment works. *See* A Legislative (p. 198) History of the Pollution Control Act Amendments of 1972 (Committee print) (hereinafter Leg. Hist.) at 1699, 1687. The House Bill contained neither of these provisions and both were dropped in conference. The Conference Report states simply that 'Under the conference substitute individual industrial users of municipal waste treatment plants will not be required to obtain a permit under Section 402.' Leg. Hist. 313. Senator Muskie's explanation for the change, much relied upon by Friendswood and its customers, can best be analyzed when considered in its entirety. As explained by Senator Muskie:

> 'The term "discharge" is a word of art in the legislation. It refers to the actual discharge from a point source into the navigable waters, territorial seas or the oceans. It does not refer to the contribution of waste by a point source to a treatment facility. The Senate provision differed from the House amendment by including in the definition of "discharge" not only direct and indirect discharges into the the navigable waters, but also discharges into municipal waste treatment plants.

> 'The Conferees discussed at some length whether or not such contribution from discharges by point sources should be subject to section 306 or should be required to obtain a permit under section 402 as required by the Senate Bill. The Conferees agreed that no specific permit would be required for any industrial users subject to sections 204, 307, or 308 contributing to a municipal waste treatment plant, but that the permit for the municipal waste treatment plant would set forth the requirements imposed on the industrial user. The elements of the requirements on the municipal plant are set forth in section 402.' (p. 199)
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> * * *
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> "Thus, the argument that only the person who directly adds pollutants to navigable waters is subject to §§ 301(a) and 402 runs contrary to congressional intent. *It was exclusively users of publicly owned treatment plants who were excluded from the definition of discharge by the conference committee.* Other 'indirect' discharges (such as users of privately owned treatment works) remained subject to § 301(a) and related provisions." (p. 201) (Emphasis added)

Further, exculpation of Allen Park from NPDES permit requirements is found in EPA Rules at 40 CFR § 125.4. Users of publicly owned treatment works such as Allen Park are expressly excluded from NPDES permit requirements. There can be no room for doubt that the LeBlanc Drain, the River Drive Interceptor, and of course the Wyandotte Treatment Plant are all publicly owned treatment works. See FWPCA § 212(2)(A) and (B) [33 U.S.C. § 1292(2)(A) and (B)].

The trial court was clearly in error in its conclusion that Allen Park was a permittee of Permit No.

MI-0026204 or that it was subject to FWPCA NPDES permit requirements. There was no permit to Allen Park, there was no legal basis for a permit to Allen Park and, as a matter of law, there cannot have been a permit violation by Allen Park.

2. THE TRIAL COURT WAS CLEARLY IN ERROR IN REFUSING TO ADMIT OR EVEN CONSIDER ENVIRONMENTAL PROTECTION AGENCY'S RECORDS AND FILES IN DETERMINING WHETHER THERE WAS AGENCY ACTION IN APPROVING A CONSTRUCTION GRANT AWARD AND WHETHER THE AGENCY ACTED ARBITRARILY OR FOLLOWED LEGAL PROCEDURES.

Early in the trial proceedings Michigan DNR introduced a document known as *Ecorse Creek Pollution Abatement Project, Element II, Final Plan* as Plaintiff's Exhibit 2 (A. 71). The City of Allen Park, objected to the introduction of this document as hearsay. The trial court overruled this objection and, without foundation or explanation the Facility Plan was admitted.

The trial court construed the Element II Plan as some sort of "final agency action" and questioned the extend to which Allen Park would be allowed to introduce evidence or cross-examine as to matters contained within the Plan (A. 85 *et seq*). The Court requested Allen Park to make a proffer of what it would prove should the court allow examination and exploration of matters within the Plan (A. 87, 88).

Offers of proof were made concerning the arbitrariness and inaccuracy of the Plan's cost effective curves (A. 91) that the Plan's environmental assessment understated potential damage in Allen Park (A. 92, 93); that other viable alternatives were not discussed, such as

best management practices (A. 95, 96) and that the Plan inaccurately reported reductions in stream B.O.D. loadings (A. 98, 99). The trial court denied all offers of proof and further, ruled it was considering the Plan as a "final agency action" subject only to limited judicial review. Still, at this time there was no record of what administrative action, if any, had been taken on the Element II Plan to elevate that document to such unassailable stature.

Eventually, the position of the trial court became more clear when, in reference to the Exhibit 2 Plan, it indicated it could not second-guess the "agency" (A. 43). Even by this time in the trial there was no evidence of any administrative record of procedures, nor even what "action," if any, was taken by any agency with regard to the Plan. The Court further stated with regard to examination of the Facility Plan, that the agency decision is final (A. 114a). Again the court limited Allen Park's cross-examination on the basis that it would not second guess the Agency's decisions (A. 121, 122). At the conclusion of trial, the court invoked the "arbitrary and capricious" standard of review of the Facility Plan.

This Court has made it clear that a review of agency action must be based on the agency's records and reasons and not on what counsel or judge *think* might have moved the agency to its conclusion. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). In *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), this Court said:

> "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* [*SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . ." (371 U.S. at pp. 168-169)

A similar rule had heretofore been applied by the Sixth Circuit Court of Appeals. *Ford Motor Company* v. *U.S. Environmental Protection Agency*, 567 F.2d 661 (CCA 6, 1977).

Notwithstanding the trial court's application of the arbitrary or capricious standard of reviewing the "agency action," the record is totally devoid of any administrative record upon which such review could have been based. Indeed, it was Petitioner who attempted to introduce EPA records and files to demonstrate that the Element II facility plan was indeed arbitrary and capricious and that EPA failed to follow its own review procedures. Petitioner advised the trial court that EPA file documents obtained by Petitioner (A. 86a) showed lack of adequate review and disclosure by EPA.

Further, Petitioner attempted to call a Mr. George Hamper from EPA Region V (A. 95, 96). The purpose was to demonstrate other project alternatives revealed in EPA's files but not considered in its final action (A. 96-98). These administrative records and files were excluded by the trial court, the court would not permit calling the EPA witness, and the court disallowed any proofs as to the administrative record and basis for decision.

The trial judge was clearly in error. It is logically and legally impossible to review an administrative action without allowing proof even as to what the agency did. Petitioner should not be held to an administrative record which the litigating agency itself fails to produce and refuses to have introduced at trial. *Cooperative Services, Inc.* v. *U.S. Department of Housing and Urban Development*, 562 F. 2d 1292 (CCA, D.C., 1977). It is axiomatic that a court cannot limit review of agency action to the administrative record where indeed the court refuses introduction of the administrative record. Such a ruling as by the trial court in this present cause, is

the very antithesis of this Court's holdings in *Burlington, supra*, and *Camp* v. *Pitts*, 411 U.S. 137 (1972) (remedy for inadequate administrative record is remanded to agency, not *de novo* review by the trial court).

If, indeed, the Exhibit 2 final Facility Plan was to be accorded the judicial deference and posture of a final agency decision or order, then the record must reflect the administrative record or proceedings which can be reviewed by the Court to determine if the agency did indeed act properly.

To be sure, the Facility Plan is the result of a good deal of effort on the part of private and governmental persons. The Plan was indeed the subject of several public discussions and was adopted by the Drain Commissioner as being a desirable method of curtailing pollution of the north branch of the Ecorse Creek from alleged combined sewer overflows. However, it is clear that the processes which have led up to the preparation of the Plan are not the kind of administrative, adjudicative type processes contemplated in Sections 554, 556 and 557 of the Administrative Procedure Act (5 U.S.C. § 554, § 556 and § 557). There was no administrative record created upon which the court could make a reasoned, judicial determination as to actions taken by either Michigan DNR or EPA.

The result reached in this present case is at variance with every decision of this Court and every circuit-level decision considering a similar question. For instance, in *Higgins* v. *Kelley*, 574 F.2d 789 (CCA 3, 1978), the third circuit held that absent a complete administrative record, a reviewing court is "incapable" (574 F.2d at p. 792) of complying with statutorily mandated review requirements (5 U.S.C. § 706[2] [D]). Likewise, the fourth circuit in *Appalachian Power Company* v. *U.S. Environmental Protection Agency*, 477 F.2d 495 (CCA 4, 1973) ruled that a reviewing court cannot simply rely

upon agency conclusions, but must review "the full administrative record," to determine if the agency considered relevant factors and whether there has been a clear error of judgment (477 F.2d at p. 507). The court went on to hold that it is "arbitrary or capricious" for an agency not to take into account all relevant factors in making its determination (*id*).

Thus, however laudable the trial court's efforts to sustain the efforts which have gone into the Facility Plan, the trial court nonetheless moved outside the proper judicial role in attempting to justify what the agency *might have* concluded. *Ford Motor Company* v. *U.S. EPA, supra*. A like result was reached in *Northeast Airlines, Inc.* v. *C.A.B.*, 331 F.2d 579 (CCA 1, 1964) where the explanation for the agency's action (in refusing to extend a certificate) was offered at trial rather than on the record of the agency itself. The court observed:

> "There should be no room for this dispute. Courts ought not to have to speculate as to the basis for an administrative agency's conclusion. Indeed, to prevent just such speculation § 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b), provides that all agency decisions shall include not only the appropriate rule, order, sanction, relief or denial thereof, but also findings and conclusions 'as well as the reasons or basis (emphasis added) therefor [sic], upon all the material issues of fact, law, or discretion presented on the record.'
>
> "However, we are not required to accept Board counsel's post hoc argument at face value. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed. 2d 207 (1962)." (331 F.2d at p. 586)

In *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F.2d 755 (CCA 4, 1957), the court

similarly condemned the lack of administrative record on which to base a judicial review. At 249 F.2d 764 the court stated:

> ". . . a reviewing court cannot perform its proper function when the regulatory body has failed to make adequate exposition of the grounds for its action. We realize the limits upon the scope of judicial review of rate orders, as taught in *Hope Natural Gas Co.*v. *Federal Power Commission*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333. But in a later case, *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 234 U.S. 626, 634, 65 S.Ct. 850, 89 L.Ed. 1235, the Supreme Court set aside an order of the Federal Power Commission, and speaking through Mr. Justice Douglas, as it had done in the Hope case, said: 'We have repeatedly emphasized the need for clarity and completeness in the basic findings on which administrative orders rest.*** Their absence can only clog the administrative function and add to the delays in the rate-making.' The same section of the Administrative Procedure Act (Sec. 8(b), 5 U.S.C.A. § 1007(b)), which calls for findings of fact, requires with equal force 'a statement of *** the *reasons* or basis therefor [sic] upon all the material issues of fact, law or *discretion* presented on the record.' (Emphasis added) This case must therefore be remanded for a fuller explanation as to the different treatments of capitalization ratio and allowance for income taxes."

In this present case the adminstrative void runs even deeper. Not only is there a total lack of administrative record upon which the agency action(s) may be reviewed, but there is even a lack of record as to what (if any) agency action is being reviewed. The trial court was clearly in error in its *post hoc* rationalizations of the Exhibit 2 Facility Plan, and without administrative

foundation, the proposed exhibit did constitute nothing more than hearsay. The trial judge should be required to allow a record to be made regarding the procedures and considerations which may have gone into approval of the Facility Plan by EPA and to properly determine whether in fact there was proper agency consideration of relevant criteria. *Citizens to Preserve Overton Park* v. *Volpe, supra.*

3. WHERE AGENCY ACTION IS CALLED INTO QUESTION, EVIDENCE WHICH DEMONSTRATES THE ARBITRARINESS OF SUCH ACTION IS CLEARLY RELEVANT WITHIN THE MEANING OF FEDERAL RULES OF EVIDENCE, RULE 401, AND THE TRIAL COURT, IN THIS NON-JURY CASE, ABUSED ITS DECRETION IN EXCLUDING SUCH EVIDENCE AS NON-PROBATIVE.

Petitioner was precluded at trial from introducing any evidence or even from cross-examination as to the arbitrariness and illegality of the agencies' actions in finding and approving the sewer construction project within Allen Park. These proferred evidentiary offerings are preserved in Petitioner's offers of proof. In each instance the proferred evidence and the attempted cross-examination went directly to issues in the case and indeed, to issues ultimately resolved by the trial court. Affirmance of the trial court's exclusion puts the sixth circuit squarely at variance with Federal Rules of Evidence, Rules 401 and 402, as well as in conflict with other circuit level decisions. In the recent decision in *Lies* v. *Farrell Lines, Inc.*, 641 F.2d 765 (CCA 9, 1981) the ninth circuit held:

> "Where evidence is highly probative and it will not tend to prejudice or confuse the jury, however, all doubt should be resolved in favor of

> admissibility and abuse of discretion may be found where no other evidence was admitted to prove the fact sought to be established by the excluded evidence." (641 F.2d at p. 773)

The relevancy of the proferred evidence is beyond question. A pertinent example is the following excerpt from the trial court's Opinion compared with the limitation of cross-examination of DNR witness Sprow. The trial court ruled:

> "Allen Park does not suggest an alternative which will improve the water quality over that contemplated by the Element 2 plan." (Opinion of the trial court, A. 34, 35).

Yet, the record (A. 105, 106) reflects the restriction placed upon Petitioner's presentation and cross-examination of Mr. Sprow:

> "The Court: I am not going to permit you to go into alternatives, if that's what you have in mind.
>
> "Mr. Feiler: I just would like to state that that was part of the direct testimony and I feel that I should have a right —
>
> "The Court: Well, but I am only going to view that part of the direct testimony that is offered as a statement of what was considered on the way towards the construction grant, the final facilities plan, Element 2.
>
> "You have a different purpose. Your purpose now would be, if I would permit it, is to draw out from this witness what, if this witness could testify to that, and let's assume he could — *what the superior advantages of some alternative might be over the one that was finally adopted. That, I will not listen to if that's your purpose,* you are right; I am not going to permit you to cross examine in that regard." (Emphasis added)

The lower court held a too strict view of relevancy within the meaning of Federal Rules of Evidence, Rule 401. That rule defines "relevant evidence":

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

"Relevancy" of necessity must relate to the case as a whole — not to one or another particular aspect. The central thrust of Petitioner's case was that the plan for the proposed sewer project was defective, that the agencies' review was arbitrary, that there was inadequate data, that cost-benefit analyses was improper, and that other alternatives were available but not considered in the construction grant award. The proffered evidence clearly would have shed light on these central issues and the court's ultimate determination of whether the plan (and the agencies' approval) was arbitrary or capricious*. The view suggested by the fifth circuit in *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors*, 630 F.2d 250 (CCA 5, 1980) is directly in point on this relevancy question and is obviously in marked contrast to the sixth circuit's affirmation in this cause. The court in *Lubbock* elaborated on the concept of relevancy:

> ". . . relevance is not defined in terms of the purpose for which the evidence is offered — it is defined in terms of its probative value within the action as a whole. Once a given piece of evidence has been found probative of *any* fact that is of consequence to the determination of the action, it

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* The Opinion of the trial court stated that it "can overturn the decisions of DNR and EPA in approving Alternative 1 [of the Element 2 facility plan] only if those decisions are arbitrary, capricious, or an abuse of discretion" (A. 37).

> is found relevant; and, insofar as its relevance is concerned, it is not inadmissible at all. In these circumstances, it is Rule 403 with its *discretionary* power to exclude (and its implicit power to *limit*) evidence in order to prevent prejudice, confusion, or waste of judicial resources, and not Rule 105 with its *mandatory* provision for limiting instructions, that is applicable: Parties may not invoke the limited admissibility rule of Rule 105 in the "limited relevancy" situation to *require* a trial court to erect a system of evidentiary pigeonholes into which sundry bits of evidence must be sorted according to an issue-by-issue assessment of its relevance." (630 F.2d at p. 267).

Trial evidence proferred by Petitioner went to the heart of the issues under consideration (and ultimately ruled upon by the trial judge) and could not conceivably be properly excluded as non-probative. The proferred evidence included*:

1. That the cost-benefit analysis used in selection of the chosen alternative was arbitrary and based upon grossly underestimated costs. That the cost analysis was based on a project cost of 22 million dollars while actual costs based on bids received would approximate 45 million dollars, which failed to include actual costs to Allen Park through property destruction and cost of additional municipal services (A. 88-90).

2. That the cost comparisons of differing alternatives was arbitrary and defective in that the comparison

---

* Each evidentiary effort is preserved within an offer of proof at the appendix record page indicated. At trial, counsel for Petitioner was given a very short time to formulate and present his offers of proof (A. 87, 88).

alternatives differed substantially in their effects upon water quality (A. 91, 92).

3. That the required environmental assessments for project selection was defective and that the agency failed to consider detrimental construction impacts within Allen Park (A. 91-93).

4. That the plan is arbitrary for reason that rights of way do not exist for the proposed construction (A. 93, 94).

5. That the agency failed to consider viable alternatives including an alternative known as best management practice as reflected in the files of EPA but never considered by EPA in its review. Petitioner attempted to call Mr. Hamper of EPA. Region V as an adverse party for testimony regarding this omission to consider relevant criteria (A. 94-96).

6. That the crucial water quality criteria of BOD (biological oxygen demand) improvement on the benefitting stream as contained in the Element II plan was scientifically inaccurate and misstated. Petitioner did advise the court that its expert witness would provide this testimony (A. 98-101).

The trial court not only excluded this evidence as non-probative (A. 104) but further, refused to even allow inquiry as to these matters on cross-examination. Even assuming "final agency action," Petitioner should have been afforded the opportunity to prove such action was arbitrary or capricious, or procedurally deficient. Such unduly restrictive rulings by the trial court precluded a fair trial for Petitioner and left Petitioner unable to put in any evidentiary proofs in support of its allegations. Unfortunately these were the very points upon which the trial court ruled against Petitioner.

Clearly the excluded evidence was of direct consequence upon the central issues in the case. The evidence was relevant (Federal Rules of Evidence, Rule 401) and it was clear error to exclude the proferred evidence (Federal Rules of Evidence, Rule 402).

There was no showing of prejudice, hardship or other reason for the exclusion of this evidence. In *Young* v. *Illinois Central Gulf R.R.*, 618 F.2d 332 (CCA 5, 1980), the court offered substantial guidance in the interpretation of relevancy questions under the federal rules of evidence:

> "Trial courts must not lose sight, however, of the liberal nature of the Federal Rules of Evidence. It must be remembered that "[t]he federal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all." *United States v. Carranco*, 551 F.2d 1197 (10th Cir. 1977); *see Mathiesen v. Panama Canal Co.*, 551 F.2d 954, 957 (5th Cir. 1977) ("All relevant testimony is admissible unless some specific rule of evidence excludes it.")." (618 F.2d at 337)

Likewise the seventh circuit in *Tire Sales Corporation* v. *Cities Services Oil Co.*, 637 F.2d 467 (CCA 7, 1980) quoted with approval from the eighth circuit's decision in *United States* v. *1,129.75 Acres of Land*, 473 F.2d 996 (CCA 8, 1973):

> "The law of evidence in federal courts favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it." (637 F.2d at p. 476)

4. THE "HARD LOOK" REQUIREMENT OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND CONSIDERATIONS OF PUBLIC POLICY REQUIRE AN EVIDENITARY RECORD BEFORE THE DEFENSE OF LACHES CAN BE APPLIED TO PREVENT A LITIGANT FROM CHALLENGING THE ENVIRONMENTAL PROTECTION AGENCY'S FAILURE TO COMPLY WITH ITS ENVIRONMENTAL REVIEW AND PUBLIC DISCLOSURE REQUIREMENTS.

The National Environmental Policy Act of 1969 (42 U.S.C. § 4321, *et seq*), has charged the Environmental Protection Agency with review of certain federal projects to ensure protection of the human environment. Congress (42 U.S.C. § 4332) and this Court have clearly stated the national public policy that the environment shall be protected and the quality of human life be preserved and improved. The mechanism of this national policy is the EPA review of all major federal actions significantly affecting the environment and judicial review of agency action to assure that the agency takes a "hard look" at proposed projects and potential environmental degradation.

If the reviewing agency fails in its review duties then it has failed in its obligation to serve the national public policy and to carry out its Congressional mandate. In such instances the equitable defense of laches should be sparingly employed to not bar an action alleging dereliction of duty by the reviewing agency. Public policy should be the guide for a trial court's application of laches to bar a suit claiming inadequate agency review and agency failure to take into account real environmental hazards.

The public policy of environmental protection should encourage judicial review of agency dereliction rather than discourage judicial review. To this end, the doctrine

of laches as a bar to judicial review should be available only upon a strong showing that delay in asserting a claim will lead to substantial harm or prejudice sufficient to outweigh the public policy. Overly facile application of laches allows the agency to benefit from its own wrongdoing — that is to say, would allow an agency to escape judicial review by disseminating inaccurate or insufficient information to the public in the first instance.

Both of these shortcomings were part of the Counterclaim by Petitioner Allen Park against EPA.

Nevertheless, the trial court invoked laches and barred Petitioner's challenge to the inadequacy of EPA's review in spite of the fact that at the time of trial (indeed, as of this date) no construction had yet begun in Allen Park. The proposed retention basin, an integral part of the project, had not yet even been located as of May, 1981, a year after trial.

The trial judge opined the Counterclaim would lead to harm to those projects already underway in the adjoined cities of Lincoln Park and Taylor. However, such a finding by the lower court was not supportable and was merely an attempt to keep Allen Park from proceeding with its claim and to "hurry up" the trial. Petitioner's proposed Counterclaim sought to require EPA to prepare a full Environmental Impact Statement. There was no showing of any kind (nor any lower court finding) that the *process* of environmental review would lead to harm or prejudice other than, of course, requiring EPA to do its job. The Counterclaim may ultimately have been sustained or dismissed. There can be no question that the allegations of environmental dereliction are substantial. There is no finding of any prejudice which in any way would overshadow the clear public policy of insuring adequate and sound environmental review of federal projects. It was error for the trial court to assume, outside this record, that an environmental impact

statement would stop the project in Allen Park or even delay it.

Immediately prior to trial (only some four months after suit was started) counsel for Petitioner was first permitted to review the records of this project at EPA's Region V offices in Chicago. Based on the data contained in EPA's own files and the consequent omissions in EPA's public disclosures, Allen Park's Counterclaim asserted, *inter alia*:

1. That the Environmental Assessment and Negative Declaration failed to address site specific impacts upon the City of Allen Park, where the bulk of construction was to occur, including structural damage to homes and disruption of municipal services.

2. That the Environmental Assessment and Negative Declaration failed to consider alternatives with particular regard to the City of Allen Park, including best management practices.

3. That the Environmental Assessment and Negative Declaration failed to meet the Council on Environmental Quality guidelines and the NEPA mandates by not mentioning anticipated further allocation of substantial resources in a projected further project to capture storm water runoff.

4. That the Environmental Assessment and Negative Declaration failed to disclose that the project won't achieve water quality standards without subsequent surface water treatment.

5. That the Environmental Assessment and Negative Declaration were improper because they were based upon consulting engineers and not on independent agency judgment.

6. That the Environmental Assessment and Negative Declaration were misleading in not mentioning that

another multi-million dollar project was necessary to meet water quality standards and that present construction costs were grossly understated.

7. That the Environmental Assessment and Negative Declaration were misleading because they did not describe that a study was underway to analyze the treatment plant where Allen Park discharged its combined sewage; instead it gave the impression that the alternative of chemical treatment was too costly.

The application of laches by the lower court prevented judicial review of whether the agency complied with the substantive and procedural requirements which this Court found to be necessary in *Vermont Yankeee Nuclear Power Corporation* v. *National Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). There was no showing of harm, prejudice or intentional delay in requiring EPA to prepare a proper environmental review in conformance with NEPA and the CEQ Guidelines*. The trial court incorrectly assumed the purpose of the counterclaim was to stop the project. This incorrect assumption cannot be gleaned from the counterclaim which *only* sought enforcement of EPA's duties. The court could only have assumed that the environmental review would show the project to be ill conceived and, therefore, EPA would choose not to proceed with it, or EPA would conceive of a less catastrophic alternative.

Neither of the above assumptions constitute the harm or prejudice necessary to apply laches. Rather, the public would be *benefited* by either of those assumptions. Indeed, the very purpose of NEPA requires that the less catastrophic choice be chosen in the first instance. 42 U.S.C. § 4332.

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* The trial court believed that the EIS could be performed in approximately two weeks (A. 101a).

This Court in *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976) stated that:

> "NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by 'all practicable means, consistent with other essential considerations of national policy.' NEPA § 101(b), 42 USC §4331(b) [42 USCS § 4331(b)]. Section 102(2)(C) is one of the 'action-forcing' provisions intended as a directive to 'all agencies to assure consideration of the environmental impact of their action in decision-making.' Conference Report on NEPA, 115 Cong Rec 40416 (Dec. 20, 1969) (Senate).[18] By requiring an impact statement Congress intended to assure such consideration during the development of a proposal or — as in this case — during the formation of a position on a proposal submitted by private parties.[19] A comprehensive impact statement may be necessary in some cases for an agency to meet this duty." (427 U.S. 409) (emphasis added) (footnotes omitted)

The Congressional intent of assuring consideration of the environmental impact from proposed major projects should not be thwarted by laches. The application of laches should not be used to circumvent the agency "hard look." The role of the reviewing court was stated in *Kleppe*, as follows:

> "21. (10b) Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences agency as to the environmental consequences of its actions. See Scenic Hudson Preservation Conference v FPC, 453 F2d 463, 481 (CA2 1971), cert denied. 407 US 926, 32 L Ed 2d 813, 92 S CT 2453 (1972). The only

> role for a court is to insure that the agency has taken a hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." Natural Resources Defense Council v Morton, 458 F2d 827, 838, 418 US App DC 5, 16 (1972)." (427 U.S. 410) (emphasis added)

Casual application of the defense of laches without an evidentiary record showing that the agency, in the first instance, took a hard careful look at the proposed federal project, is contrary to this Court's decision in *Kleppe* v. *Sierra Club, supra*. See also *Ecology Center of Louisiana* v. *Coleman*, 515 F.2d 860 (CCA 5, 1975). Where the lives of many thousands of people of the City of Allen Park are involved, the application of the defense of laches should be tempered by the public inteest in assuring EPA's compliance with NEPA. See *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F.2d 1164 (CCA 6, 1972).

This Court should make clear that the defense of laches should not be too easily applied in environmental cases. To do otherwise would only thwart public policy and lead to the incongruous result reached by the trial court in this case.

CONCLUSION

The City of Allen Park, for all the reasons set forth above, respectfully urges the Court to grant a Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

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Appendix

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81-1555

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF ALLEN PARK,
Petitioner,
vs.
STATE OF MICHIGAN, THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GREENFIELD CONSTRUCTION COMPANY, INC., LANZO CONSTRUCTION COMPANY, INC., GIANNETTI CONSTRUCTION OF MICHIGAN, INC., ROCCO FERRERA & COMPANY, INC., ROBERT LINCICH AND BILL SERPETTI, JR.,
Respondents.

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

DOCKET ENTRIES

1979

Dec. 12. Complaint filed, summons issued.
Dec. 12. Pltf's. M/for Special Appointment to Serve Process, with brief in support.
Dec. 12. Order Appointing Special Process Server. Feikens, J.

Dec. 12. Pltf's. M/for Preliminary Injunction and other relief with brief and attachments.

Dec. 18. Notice of hearing on M/for Pre. Inj. set for 1-02-80 at 2:00 pm

Dec. 31. Amendment to M/for Pre. Inj. and other relief by Pltfs'.

Dec. 31. Proof of service re: #6.

1980

Jan. 3. Answer on behalf of Wayne County Drain Commissioner.

Jan. 3. Appearance of counsel for The City of Allen Park with notice of same.

Jan. 3. Dft., City of Allen Park, First Response in Opposition to Plft's. M/for Preliminary Injunction with exhibits.

Jan. 3. Dft., City of Allen Park's Answer and Affirmative Defenses to Complaint

Jan. 9. Affidavit of Pat A. Mislinski with attachments.

Jan. 9. Supplemental affidavit of Raymond P. Canale in support of Plft's. Motion for Preliminary Injunction

Jan. 9. Federal Defendant's Motion to Dismiss and Response in Opposition to Plfts'. Motion for Preliminary Injunction with brief and cert. of service.

Jan. 9. Affidavit on certified mailing of summons.

Jan. 9. Affidavits (5) on Return of Service by Special Process Server Vincent Law

Jan. 11. Motion for Preliminary Injunction heard and Denied. Feikens, J.

Jan. 13. Proof of service re: #10 & 11.

Jan. 14. Conference held. Feikens, J.

Jan. 28. Appearance and Notice of same as counsel for the County of Wayne, only.

Jan. 28. Conference held. Feikens, J.

Feb. 11. Entry and Notice of Appearance for Dft's., The LeBlanc Tile Drainage District, The Drainage for Ecorse Creek Pollution Abatement Drain No. 1 and Charles N. Youngblood, The Wayne County Commissioner, only.

Feb. 13. Conference held. Feikens, J.

Feb. 19. Letter from Counsel confirming adjournment without date of Federal Defendant's M/to Dismiss for Lack of Jurisdiction.

Feb. 21. Appearance and notice of same as co-counsel along w/Paonucco & Kruse for Dft. City of Allen Park.

Feb. 21. Order of Consolidation with Case # 79-74682. Feikens, J.

Feb. 27. Notice of taking deposition of Terrance Galoway on 3-10-80 at 10:00 am with cert. of service.

Feb. 27. Notice of taking deposition of Raymond P. Canale, Ph.D., on 3-12-80 at 2:00 pm w/cert. of service.

March 5. Deft's. #2 & 3's answer to complaint.

March 6. Notices (2) of taking depositions of Richard Huebler (3/18/80 @2:00) & of Frank J. Lada (3/18/80 @10:00) with proof of service.

March 11. Deposition subpoena to testify directed to Richard Huebler, City Controller for the City of Allen Park, Michigan with return on service, set for 3-18-80 at 2:00 pm

March 11. Deposition Subpoena to testify directed to Frank J. Lada, Mayor of the City of Allen Park, Michigan, on the 18th day of March, 1980 at 10:00 am with return on service.

March 17. Plft's. brief with respect to financing of local share of water pollution abatement control project costs.

March 17. Proof of service re: #29.
March 17. Deft. County of Wayne's answer to complaint with affirmative defense
March 17. Defts. Brief Amicus Curiae, w/proof of service.
March 20. Notice of Taking Deposition of James Hamilton on 3/27/80 at 10:00 w/proof of service.
March 20. Notice of deposition taking of Williams & Works on 4-02-80 at 9:00 am with proof of service.
March 20. Notice of taking deposition of Alfred Benkert on 4-01-80 at 10:00 am with Exhibit A.
March 20. Proof of service re: #34 & 35.
March 24. Dft. State of Michigan's Answer to Complaint with Appendix.
March 24. Proof of service re: #37.
March 26. Notice of Taking Deposition of Donald Trim on April 3, 1980 at 10:00 w/cert. of service.
March 26. Proof of service. RE: Notice of Deposition.
March 31. Deposition Subpoenas (4) on Donald Trim, James Hamilton, Raymond P. Canale and Terrance Galoway.
March 31. Notice of Taking Deposition of Duane R. Egeland on 4/7/80 at 2:00 w/proof of service.
Apr. 2. Answer of United States Environmental protection agency.
Apr. 3. Answer of Charles Youngblood, Wayne County Drain Commissioner and Le Blanc Tile Drainage District to cross-claim, with proof of service.
Apr. 9. Joint pre-trial statement.
Apr. 9. Joint pre-trial statement proposals.
Apr. 9. Cross-plft. State of Michigan's request for admissions.
Apr. 9. Deft. County of Wayne's pre-trial statement with proof of service.

Apr. 9. Deft. City of Allen Park's preliminary pre-trial statement.

Apr. 9. Deposition of Richard A. Huebler and Frank J. Lada.

Apr. 9. Deposition of James L. Hamilton taken on 3-27-80.

Apr. 10. Deposition of Duane R. Egeland taken on 4-07-80.

Apr. 14. Deft. #1's cross-claim against deft., Administrator of the U.S. Environmental Protection Agency with attachment and proof of service.

Apr. 14. Final pre-trial statement of the U.S. Environmental Protection Agency.

Apr. 14. Continued deposition of Raymond Canale taken on 3-19-80 and Leon May taken on 4-02-80.

Apr. 14. Deft. #7's pre-trial brief.

Apr. 15. Bench Trial begins and continued to 4-16-80. Feikens, J.

Apr. 16. Bench Trial resumes and continues to 4-21-80. Feikens, J.

Apr. 17. Settlement Conference held. Feikens, J.

Apr. 18. Depositions of Raymond P. Canale, Ph.D. taken on 4-07-80 and Jeffery C. Sutherland, Ph.D. taken on 4-08-80.

Apr. 18. Plaintiff's (contractors) brief in support of EPA/DNR motion to foreclose Allen Park's attact on final facilities plan and negative EIS declaration with attachments and proof of service.

Apr. 18. Plaintiff's memorandum brief with attachments.

Apr. 18. Federal defendant's memorandum with attachments.

Apr. 18. Brief of Defendant City of Allen Park, in support of review of exhibit 2 (element 2, final plan) with attachments.

Apr. 21. Deposition of Alfred G. Benker, taken on April 1/80.

Apr. 21. Memorandum and citation of authorities, filed by Frank J. Kelley.

Apr. 21. Bench trial resumes and continued to 4-22-80. Feikens, J.

Apr. 22. Bench trial resumes and continued to 4-23-80. Feikens, J.

Apr. 23. Bench trial resumes and continued to 4-24-80. Feikens, J.

Apr. 23. Depositions of Donald Trim taken on 4-03-80.

Apr. 24. Bench trial resumes and continued to 4-25-80. Feikens, J.

Apr. 25. Bench trial resumes and continued to 4-29-80.

Apr. 29. Order re-aligning parties for trial. See Order Feikens, J.

Apr. 29. Bench Trial resumes and continued to 4-30-80. Feikens, J.

May 1. Bench Trial resumes and continued to 5-02-80. Feikens, J.

May 2. Bench Trial resumes and continued to 5-06-80. Feikens, J.

May 5. Conf. held. Trial to resume 5/14/80.

May 9. Notice of taking deposition of Charles N. Youngblood, no date or time given with proof of service.

May 9. Deposition subpoena directed to Duane R. Engeland executed on 4/1/80.

May 12. Plaintiff Contractors' proposed findings of fact and conclusions of law with proof of service.

May 12. Conf. held. Trial resumes. Bench Opinion given to be supplemented by written opinion.

May 13. Proposed findings of fact and conclusions on behalf of City of Allen Park with proof of service.

May 14. Deft. #7's proposed conclusions of fact.

May 14. Intervening — Plft's State of Michigan Complaint upon re-Alignment

May 19. Interim Order (see pleading) Feikens, J.

May 20. Proof of service re: Proposed findings of facts and conclusions of law.

June 3. Deft. City of Allen Park's Answer to Request for admissions.

Jun. 19. Conference held.

Jun. 26. EPA's memorandum in opposition to Allen Park's attempt to depose Mr. Au, with proof of service.

Jun. 30. Deft. Drainage District's and Youngblood's brief in opposition to Allen Park's motion for deposition of Independent Contractor.

Jul. 1. Final order and judgment re: see order. Feikens, J.

Jul. 1. Deft. City of Allen Park's Objections to proposed Judgment.

Jul. 16. Deft. City of Allen Park's notice of appeal on final judgment.

Jul. 24. Proof of service re: Appeal.

Jul. 24. Notice to counsel re: Appeal.

Jul. 25. Defendant's proposed findings of fact.

Jul. 25. Plaintiffs Lindisch and Serpetti's proposed findings of fact and conclusions of law.

Aug. 15. Ack. from CCA re: notice of appeal received, CCA case # 80-1554.

Sept. 24. Conference held.

Oct. 1. Conference held.

Nov. 6. Opinion pursuant to the judgment.

Dec. 9. Transcript from April 15/80.

Dec. 9. Transcript from April 22/80.

Dec. 9. Transcript from April 25/80.

Dec. 9. Transcript from May 1/80.

Dec. 9. Transcripts sent to CCA.

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Jan. 16. Transcript from Sept. 24/80.

Feb. 26. Stip. that Pahil Serpetti, Jr. withdraw as a party pltf.

Mar. 3. Order re: Phil Serpetti, Jr. be & is withdraw as a party pltfs., w/no prejudice to any party. (order is referring to #79-74682)

Mar. 16. Transcript from 6/20/80.

Mar. 16. Sent to CCA

Apr. 2. Ack. from CCA re: file. (80-1554)

Apr. 16. Pltfs., State of MI, motion to compel compliance w/court order & judgment w/brief, notice of hearing to be set by the court attachments and proof of service.

Apr. 17. Ack. from CCA re: receiving transcript, supplemental.

Apr. 23. Notice of hearing of motion to compel set for 5/20/81 at 2:00 pm, notice sent.

Apr. 28. Pltfs., Contractors, motion to compel selection of retention basin & puping [*sic*] facility site, w/proof of service.

May 19. Dfts., Youngblood, Drainage District of Ecorse Creek, answer to motion to compel compliance with court order & judgment w/attachments.

May 19. Dfts., Allen Park, response to motion by pltfs., MDNR, to compel selection of retention basin site w/proof of service.

May 16. Pltfs., State of MI, motion to compel compliance with court order & judgment (ok'd w/out brief).

May 16. Dfts., City of Allen Park, motion to quash subpoena w/brief, and notice of hearing set for 5/20/81.

May 18. Motion to compel heard & taken under advisement.

May 20. Return of civil subpoena as to Ted Mrozowski served on 5/18/81. & Frank J. Lada served on 5/18/81.

May 27. Order re: setting date for selection of site for contract 13 Retention Basin no later than 6/5/81.

Oct. 13. Order from CCA re: judgment of district court is affirmed. (file not returned)

Dec. 22. Mandate from CCA Judgment Affirmed. (file returned)

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals for the Sixth Circuit)

(State of Michigan, et al. v City of Allen Park. No. 80-1554)

(Filed Nov. 23, 1981)

Before: Brown and Martin, Circuit Judges; Cecil, Senior Circuit Judge.

No judge of the court having moved for rehearing *en banc*, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

/s/ Leonard Green
Chief Deputy Clerk

ORDER

(United States Court of Appeals for the Sixth Circuit)

(State of Michigan et al. v City of Allen Park, No. 80-1554)

(Filed Oct. 8, 1981)

Before: Brown and Martin, Circuit Judges; Cecil, Senior Circuit Judge.

The City of Allen Park, defendant below, appeals from a decision of the district court in which the court held that the failure by Allen Park timely to complete the sewer separation project in question violated the applicable National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Michigan. The court entered an order requiring Allen Park to proceed immediately with the financing and construction of its segment of the project. *See State of Michigan v. City of Allen Park*, 501 F. Supp. 1007 (E.D. Mich. 1980).

Upon examination of the record on appeal and consideration of the briefs and oral arguments of counsel the court concludes that the district court committed no reversible error and reached the correct result.

Accordingly, the judgment of the district court is Affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

FINAL ORDER AND JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(State of Michigan, et al. v City of Allen Park, et al. No. 79-74681. State of Michigan, et al. v City of Allen Park. No. 79-74682)

(Filed July 1, 1980)

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on the 20th day of July, 1980.

PRESENT: Honorable John Feikens
Chief Judge, U.S. District Court

This action came before the Honorable John Feikens for trial; testimony, documentary evidence, briefs and arguments of counsel were received and considered, the Court having on May 14, 1980 issued findings of fact and conclusions of law on the record, the court now orders and adjudges as follows:

A. IT IS ORDERED AND ADJUDGED that the defendant drainage districts and the defendant drain commissioner shall proceed forthwith to fund and construct the Element II Facilities Plan, Alternative 1, in its entirety, including without limitation, contracts 1-5 and a project for a retention basin.

B. IT IS FURTHER ORDERED AND ADJUDGED that the City of Allen Park shall forthwith participate in the funding and construction of the Element II Facilities Plan, Alternative 1, in accordance with its terms, including without limitation, contracts 1-5 and a project for a retention basin.

C. IT IS FURTHER ORDERED AND ADJUDGED that pursuant to the State of Michigan Court Order Bond Act, Act No. 320 of the Public Acts of 1927, as amended, and the State of Michigan Drain Code, Act No. 40 of the Public Acts of 1956, as amended, defendant drainage districts and the defendant drain commissioner shall apportion and assess the cost of the Element II Facilities Plan, Alternative 1, including sewer separation in the City of Allen Park against the public corporations benefitted, which includes the City of Allen Park, and that upon being so assessed the City of Allen Park shall in each year provide funds necessary to meet such obligation, which may include but is not necessarily limited to the levying of a tax on all taxable property in its jurisdiction in an amount necessary to pay the amount payable on the assessment for that year and that such tax shall be levied without limitation as to rate or amount. That such tax, being for the purpose of public health and safety is not subject to public referendum pursuant to Article IX section 6 or sections 25 through 34 of the 1963 Michigan Constitution as amended.

D. IT IS FURTHER ORDERED AND ADJUDGED that the defendant drain commissioner and the drainage districts aforesaid shall immediately proceed to locate and obtain appropriate MDNR and EPA approval and to redesign and construct the project for a retention basin as defined in the Element II Facilities Plan, Alternative 1.

E. IT IS FURTHER ORDERED AND ADJUDGED that the City of Allen Park's cross-claim against USEPA is dismissed.

F. IT IS FURTHER ORDERED AND ADJUDGED that due to the urgency of this action and the serious public questions involved this court will retain jurisdiction for the purpose of implementing the Judgment.

/s/ J. Feikens
Chief Judge, U.S. District Court

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(State of Michigan, et al. Plaintiffs, v The City of Allen Park, et al. Defendant's, No. 79-74681. State of Michigan R. Lindisch and T. Serpetti, Jr., Plaintiffs, v The City of Allen Park, Defendant No. 79-74682)

(Filed Nov. 6, 1980)

Background

This case concerns the water quality of the North Branch of the Ecorse Creek, a creek which begins just north of Detroit Metropolitan Airport, thirteen miles from the mouth. It flows eastward through the communities of Dearborn Heights, Allen Park, Lincoln Park and Ecorse, and merges with the South Branch of Ecorse Creek three-fourths of a mile west of the Detroit River. The point where the Ecorse River empties into the Detroit River is located in Lincoln Park. (P. Ex. 5, 24). The North Branch of the Ecorse Creek is part of "waters of the state," as defined by the legislature, MCL § 323.11(b) (MSA § 3.531(b)), and has been designated for partial body contact uses. (P. Ex. 2, p. 39).

In May, 1969 the Michigan Water Resources Commission ("WRC") initiated a survey of the Ecorse River in conjunction with a plan of implementation to correct existing water quality problems. During wet weather, when flows within combined sewer system are high, untreated domestic sanitary sewage and stormwater runoff are discharged from nine outlets

along the North Branch of the Ecorse Creek and two outlets along the South Branch. (P. Ex. 5, 24). The WRC study showed high total and fecal coliform counts[1] in Ecorse Creek, as well as large concentrations of materials with high biochemical oxygen demand ("BOD") causing an extremely low level of dissolved oxygen[2] in Ecorse Creek. Algal densities were excessive and the only bottom-dwelling organisms were pollution-tolerant sludge worms. (P. Ex. 24). That study confirmed that the discharge of combined sewer overflows into the river was the principal cause of its "severely degraded condition." (P. Ex. 24, p. 1).

In November of 1970 the Michigan Department of Natural Resources ("DNR") ordered the communities within the Ecorse Creek Basin to correct pollution emptying into Ecorse Creek and the Detroit River. The Wayne County Drain Commissioner, Charles Youngblood, consequently authorized a study of the sewer system to determine solutions for water quality problems of Ecorse Creek. The culmination of this study was the *Facility Planning Study: Pollution Abatement of Ecorse Creek, Element 2 – Combined Sewer Areas, Final Plan* (Wayne County Drain Commissioner, February 1977). (P. Ex. 2). Three alternatives were evaluated on the basis on monetary costs, contribution to water quality goals,

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[1] Fecal coliform counts are counts of organisms associated with the digestive tracts of warm-blooded animals including humans, and provide an indication of the potential presence of desease-causing enteric organisms in the water sampled. Such enteric organisms are associated with water-borne diseases such as hepatitis and typhoid. (Canale and Willson testimony).

[2] Dissolved oxygen measurements in water samples are an indication of the amount of oxygen in water available for use by biological organisms such as fish life which need oxygen for respiration. (Sprow testimony).

public acceptability, environmental impact and implementation capability. (P. Ex. 2, p. 7).

Alternative 1 called for Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff. This program would provide for continuous treatment of domestic sanitary sewage at the Wayne County Wyandotte Wastewater Treatment Plant during all flow conditions and the release of only storm surface run-off to Ecorse Creek. (P. Ex. 2, 8, 9 and 25). The end result would be to correct eight of the nine combined sewage overflows into the North Branch of the Ecorse Creek, with the remaining location being corrected independently by the City of Ecorse. (Sprow and Trim testimony, P. Ex. 2, p. 15). Alternative 2 proposed separation of combined sewers in Taylor, diversion of storm runoff from the LeBlanc Drain at an upstream point, and storage and treatment of the remaining combined sewer overflows. Alternative 3 called for no major modification of the sewer system, but addressed the problem by intercepting, storing and treating all the combined sewer overflows. (Trim testimony, P. Ex. 2).

The study recommended selection of Alternative 1 as the most cost-effective plan. Alternative 1 was formally selected for implementation by the North Branch of Ecorse Creek Drain Improvement Board following evaluation of input at a public hearing on January 27, 1977. (P. Ex. 2, p. 79). Alternative 1 received wide public support from citizen groups and endorsement by government agencies, including Allen Park, based on the beneficial environmental effects of the project. These effects include reduced energy use and costs for operation and maintenance of the Wyandotte Treatment Plant, a reduction in local basement flooding

as well as risks to public health and safety due to increased sewer system reliability, and improved water quality in the Ecorse Creek, the Detroit River and Lake Erie with the reduction in solids, BOD, and phosphorus loading. (Trim testimony, P. Ex. 2, p. 88). The DNR and the United States Environmental Protection Agency ("EPA") approved Alternative 1. (P. Ex. 1).

Outfall 001 is one of the locations where combined sewer overflows occur and it contributes significantly to the pollution of the North Branch of the Ecorse Creek. A major sorce of the combined sewer overflow at outfall 001 is the LeBlanc Drain, which serves the LeBlanc Tile Drainage District, comprised of portions of Allen Park, Lincoln Park and Taylor, excluding areas served by the Detroit Water and Sewerage Department in the northern and southern portions of Allen Park. (Sprow testimony, P. Ex. 5(b)). Raw sanitary sewerage and stormwater in the LeBlanc Drain, including combined sewage from branch sewer lines (the Moore arm and Horger Arm), are conveyed through the LeBlanc Drain eastward to the River Drive Interceptor. (P. Ex. 5(b)). Before reaching the interceptor, the LeBlanc Drain flows into a junction chamber near the intersection of Capitol Avenue and River Drive in the City of Lincoln Park. During periods of dry weather the combined sewage flows by gravity from the junction chamber into a regulator device from which it is conveyed to the Wayne County Wyandotte Treatment Plant via the River Drive Interceptor. However, the River Drive Interceptor has insufficient capacity to convey high wet weather flows from the Ecorse Creek drainage basin to the Wyandotte Treatment Plant. During wet weather, when the water level in the LeBlanc Drain exceeds the water level in the North Branch of the Ecorse Creek, two flap gates in the

junction chamber will open and allow flows from the LeBlanc Drain to enter two enclosed pipes which convey combined sewage into the North Branch of the Ecorse Creek from outfall 001. (Sprow and Trim testimony, P. Ex. 7).

On June 14, 1977 the City of Allen Park Council passed a resolution approving the financing of drain improvements and authorizing a petition to the Wayne County Drain Commissioner requesting drainage improvements pursuant to Chapter 20 of the Drain Code of 1956, as amended, MCL § 280.461 *et seq.* (MSA § 11.1461 *et seq.*). (D. Ex. 46). Upon evaluation of a petition submitted by the Cities of Allen Park, Dearborn Heights, Lincoln Park and Taylor, County of Wayne and State of Michigan, and following statutory notice and public hearing, MCL § 280.467 (MSA § 11.1467), a Final Order of Determination was entered on October 19, 1977, determining that the petition for a drainage project (designated the Ecorse Creek Pollution Abatement Drain No. 1) was sufficient and that the project was necessary for the public health and should be constructed. (D. Ex. 45).

On January 20, 1978 the DNR Water Quality Division issued NPDES permit No. MI-0026204 to the LeBlanc Tile Drainage District (replacing a prior permit issued on November 29, 1974) setting forth conditions for discharge from the LeBlanc Drain. (Sprow and Zugger testimony, P. Ex. 1).[3] The permit authorizes discharge from LeBlanc Drain until March 31, 1982, provided that

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[3] Discharges from outfall 001 are regulated under the National Pollutant Discharge Elimination System (NPDES), established by the 1972 amendments to the Federal Water Pollution Control Act. 33 U.S.C. § 1251, *et seq.* See page 12 *infra*.

the combined sewer overflows will be controlled by that time and that the LeBlanc Tile Drainage District complete construction of the sewer separation plan called for in the Element 2, Final Plan. (P. Ex. 1). In the interim period, the Wayne County Drain Commissioner, acting for and on behalf of the LeBlanc Tile Drainage District, is required to utilize to the maximum extent the available receiving sewerage system transportation capabilities for the delivery of combined sewage to the River Drive Interceptor and the Wayne County Wyandotte Wastewater Treatment facilities. (P. Ex. 1).

The EPA and DNR tendered Step III grants for federal and state financial assistance to implement the necessary construction program. (Sprow and Trim testimony, P. Ex. 1). EPA was to provide seventy-five per cent of the funding of the grant eligible portions of the project and DNR was to provide five per cent of such funding. The remaining twenty per cent of the cost was to be allocated among the local units of government which had originally petitioned for the pollution abatement project — Allen Park, Lincoln Park, Taylor and Dearborn Heights. (P. Ex. 2, p. 50).

Early in 1978 the Drainage District Board for the Ecorse Creek Pollution abatement Drain No. 1 proposed an apportionment of costs which was confirmed, following statutory notice and hearing, on April 26, 1978. (D. Ex. 44). An assessment roll was prepared which set Allen Park's apportioned cost at 52.9105% of the local share amount of $20,040,981.76 to be assessed to the cities, state and county. (D. Ex. 46(a)). The Drainage District Board divided the construction project into thirteen construction contracts for work in the four communities involved and advertised them for competitive bidding. Bids were received on all thirteen contracts and opened on June 27, 1978. (D. Ex. 43).

The bids for the project were higher than the Drainage Board had originally estimated. Consequently defendant Allen Park raised objections to various facets of the sewer separation project in July of 1978, and in August, 1978 filed suit against the Drainage District for the Ecorse Pollution Abatement Drain No. 1, the Drain Commissioner and Treasurer of Wayne County, and the County of Wayne in the Wayne County Circuit Court (No. 78-825-174-CZ), seeking an injunction against the project. (Ex. 2, Allen Park's Answer). That case settled when the parties, upon endorsement by the DNR and approval by the EPA, agreed to divide the project into two segments. (Attachment C, Lindisch and Serpetti complaint).

Segment I consists of Contracts 6, 7, 8, 9, 10, 11 and 12, and covers sewer separation and storm water control in the cities of Taylor, Dearborn Heights and Lincoln Park. Segment II consists of Contracts 1, 2, 3, 4, 5 and 13 and covers sewer separation, sanitary retention facilities and pumping facilities for the City of Allen Park. Pursuant to the settlement agreement, Ecorse Creek Drainage District awarded only Contracts 6 through 11 and readvertised Contract 12. (D. Ex. 41). Federal and state grants were received for Segment I and the work on that segment is substantially completed. (Sprow and Trim testimony). Approval of the segmentation was conditioned upon the commitment of Charles Youngblood, Wayne County Drain Commissioner, and the LeBlanc Tile Drainage District to complete Segment II by March 31, 1982.

Contract specifications accompanying the bids for Segment II specify a needed construction time of 730 days (2 years). On December 14, 1978, the EPA notified the Wayne County Drain Commissioner and City of Allen park that, in accordance with the requirements of

40 C.F.R. § 35.930 (b), the Drain Commisioner must commit to a schedule by which the various segments of the project would be accomplished. (Attachment C, Lindesch and Serpetti complaint). In response, the Wayne County Drain Commissioner, Charles Youngblood, in a letter dated January 31, 1979, committed the Drainage District to initiating construction of the Allen Park segment by March 1, 1980 and to completing construction of the project by March 31, 1982 as required by the NPDES permit. (Attachment D, Lindisch and Serpetti complaint).

On November 28, 1979, DNR issued notices of violation to the City of Allen Park and the LeBlanc Tile Drainage District. (P. Ex. 3, 4). The notices of violation were issued because under the DNR projected schedule for completion by March 1982, bid advertisements for the Allen Park segment must have begun by October 30, 1979, and the City of Allen Park and the LaBlanc Tile Drainage District had failed to initiate the process.

On December 12, 1979, two complaints were filed against Allen Park[4] for its failure to proceed with the Element 2 project, which were subsequently consolidated by an order dated February 21, 1980. The case assumed its present posture on April 15, 1980 when the DNR and EPA, originally named as defendants by the construction company plaintiffs, were realigned as plaintiffs by my order pursuant to Rule 21 of the Federal Rules of Civil Procedure.

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[4] *Lindisch and Serpetti* v. *The City of Allen Park*, No. 79-74682, and *Greenfield Construction Company, et al* v. *The City of Allen Park, et al*, No. 79-74681. The latter complaint also named the other defendants remaining in this suit, as well as EPA and DNR.

Jurisdiction

Jurisdiction is vested in this court pursuant to Section 505 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(a) ("FWPCA"), and 28 U.S.C. § 1331, in that the amount in controversy exceeds the sum or value of $10,000 and arises under the Constitution, laws or treaties of the United States. Pendent jurisdiction exists for the state law claims and relief sought under the Water Resource Commission Act, MCL § 323.7(1) (MSA § 3.527(1)); the Drain Code, MCL § 280.461 *et seq.* (MSA § 11.1461 *et seq.*); and the Court Order Bond Act, MCL § 123.247 (MSA § 5.2667). The plaintiffs seek a declaratory judgment under 28 U.S.C. § 2201 and injunctive relief under 28 U.S.C. § 2202.

Standing

There is no dispute that DNR has standing to bring an enforcement action against defendants in its realigned role as paty plaintiff. FWPCA § 309, 33 U.S.C. § 1319; MCL § 323.3 (MSA § 3.523). However, the standing of the original plaintiffs in the suit, the Allen Park citizens and the group of construction companies, was challenged as not meeting the requirements of the citizen suit provision of FWPCA § 505, 33 U.S.C. § 1365[5]. That

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[5] § 1365. Citizen suits

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitaton under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

(continued on following page)

section authorizes a civil enforcement suit by any citizen after sixty days' notice against any person or governmental body in violation of an effluent standard or limitation or an order issued by the EPA or the State. "Citizen" for the purposes of this provision is defined to mean "a person or persons having an interest which is or may be adversely affected." FWPCA § 505(g), 33 U.S.C. § 1365(g). The term "person" under the Act includes a corporation. FWPCA § 502(5), 33 U.S.C. § 1362(5). An "effluent standard or limitation" includes "a permit or condition thereof issued under section 1342" of the Act. FWPCA § 505(f), 33 U.S.C. § 1365(f). Notice of intent to sue was given, as required by 33 U.S.C. § 1365(b). (Attachment A, Lindisch and Serpetti complaint).

Defendant Allen Park contends that plaintiffs Lindisch and Serpetti are not persons "having an interest which is or may be adversely affected" because their sewers will

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(continued from preceding page)

(b) No action may be commenced —

(1) Under subsection (a) (1) of this section —

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order or,

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, . . .

* * *

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

not connect with the Element 2 project. The standing of the contractor plaintiffs, who so not allege residence in Allen Park or the Ecorse Creek vicinity, is challenged on the ground that the financial or generalized interest they seek to protect is not within the realm of interests protected by FWPCA. I disagree and find that both sets of plaintiffs are "persons having an interest which is or may be adversely affected" and therefore have standing under the citizen suit provision of FWPCA, 33 U.S.C. § 1365.

According to legislative history, the requirement that a person have "an interest which is or may be adversely affected" is to be interpreted in light of the Supreme Court's decision in *Sierra Club* v. *Morton*, 405 U.S. 727 (1973). 1972 U.S. Code Cong. and Admin. News, p. 3823. In that case, the Court denied standing under section 1 of the Administrative Procedure Act, 5 U.S.C. § 702, to an environmental group which failed to allege specific harm to itself or its members.

Here, the Allen Park citizens, Lindisch and Serpetti, allege an interest sufficient to confer standing by claiming that they are residents and homeowners within the City of Allen park whose properties and persons are adversely affected by the combined sewer system. Specific allegations of use of a resource are not necessary for plaintiffs living within the vicinity of the natural object thay seek to protect, *See Montgomery Environmental Coalition* v. *Fri*, 366 F. Supp. 261, 264 (D.D.C. 1973).

The contractor plaintiffs, who are the low bidders on Contracts 1 through 5 of the Allen Park segment of the Element 2 project, allege in their complaint that they all have incurred substantial expense in bidding the project

and in committing millions of dollars of bonding capacity to it, and are therefore harmed by defendants' inaction.[6] The standing of the corporate contractors is challenged on the ground that their economic injury is not within the "zone of interests" to be protect by FWPCA, under the test for standing developed for suits under the Administrative Procedure Act ("APA") Section 10, 5 U.S.C. § 702.

The cases concerning "disappointed bidders" cited by Allen Park and EPA[7] are distinguishable from the

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[6] Plaintiffs' counsel represents that the contractors agreed to hold their bids open at the stated prices for a reasonable time.

[7] Courts have not been consistent in decisions on standing for disappointed bidders. Standing in suits challenging decisions by the EPA on bidding procedures is usually asserted under Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, which provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Supreme Court has ruled that a person is "aggrieved" within the meaning of this provision if that person has suffered "injury in fact" and is "arguably within the zone of interests to be protected or regulated by the statute . . .". *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). At least two district courts have ruled that a bidder on a FWPCA contract is arguably within the zone of interests sought to be protected by FWPCA and therefore entitled to standing under APA § 10. *CCTW&M* v. *USEPA*, 452 F. Supp. 69, 75-76 (D. N.J. 1978); *Union Carbide Corp.* v. *Train*, 73 F.R.D. 620, 622-24 (S.D. N.Y. 1977). *But see Standard Engineers and Constructors Inc.* v. *USEPA*, 483 F. Supp. 1163 (D. Conn. 1980) (Even though FWPCA and its regulations evidence an intent to protect "the integrity of the bidding process," contract bidders lack standing to sue on behalf of the public interest.); *Sovereign Construction Company, Ltd.* v. *City of Philadelphia*, 439 F. Supp. 692, 695-697 (E.D. Pa. 1977); *aff'd mem.*, 82 F. 2d 1276 (3d Cir. 1978) (no standing under FWPCA, 33 U.S.C. § 1365).

present situation. Contrary to the typical "disappointed bidder" case, the contractors here are not suing EPA under the Administrative Procedure Act to protest rejection of their bids; rather, this suit is in the nature of an enforcement action against the defendants for their failure to take any action on the bids submitted or to commence construction, a violation of the terms of NPDES Permit No. MI-0026204. Contrary to the usual situation in "disappointed bidder" cases, this suit will have the effect of spurring compliance with the NPDES permit, rather than hampering its implementation. Because the contractors do have an interest that is adversely affected by defendants' continued inaction, and because this is an enforcement action which will further the goals of FWPCE, I find that the contractor plaintiffs do have standing under the citizen suit provision of FWPCA § 505, 33 U.S.C. § 1365. *See State of Ohio ex. rel. Brown* v. *Callaway*, 497 F. 2d 1235, 1243 (6th Cir. 1974).

NPDES Permit Violation

The Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), 22 U.S.C. § 1251 *et seq.*, prohibit the discharge of any pollutant into waters of the United States except in compliance with a permit specifying conditions of discharge. FWPCA § 301, 33 U.S.C. § 1311. Authority to issue permits under the National Pollutant Discharge Elimination System ("NPDES") is vested in the Administrator of EPA, but that authority may be delegated to states upon application and approval by the EPA. FWCPA § 402(b), 33 U.S.C. § 1342(b). The State of Michigan has been granted authority to administer the NPDES permit program by EPA for sources discharging within the State. (Zugger testimony) Authority for issuing permits is founded on the State's Water

Resources Commission Act, MCL § 323.1 *et seq.* (MSA § 3.521 *et seq.*), and procedures for issuance of NPDES permits have been established by the Michigan Water Resources Commission in Administrative Code 1954, TAACS 77, R. 323.2101, *et seq.*

FWPCA authorizes imposition of "such conditions [on NPDES permits] as the Administrator determines are necessary to carry out the provisions of this chapter." FWPCA § 402(a)(1), 33 U.S.C. § 1342(a)(1). To establish a violation of 33 U.S.C. § 1311(a) or analogous state law,[8] plaintiffs must prove two elements: that defendants have discharged pollutants from a point source into navigable waters and that such discharge does not comply with a permit condition.

The plaintiffs produced studies of Ecorse Creek and the testimony of seven DNR employees and one independent expert witness to establish that defendants are discharging pollutants from outfall 001 in violation of the NPDES permit.

In 1970 the DNR conducted dye studies to ascertain whether sanitary sewage originating in Allen Park, as well as other communities, reached the North Branch of

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[8] State law similarly prohibits the discharge of wastes into waters of the state without a valid permit, and authorizes imposition of "such effluent requirements as the [Water Resources] Commission deems necessary to prevent unlawful pollution by such dates as the Commission deems to be reasonable and necessary and to assure compliance with applicable federal law and regulations." Water Resources Commission Act. MCL § 323.7(1) (MSA § 3.527(1)). Although plaintiffs also assert causes of action under the Michigan Environmental Protection Act of 1970, MCL § 691.1201 *et seq.* (MSA § 14.528(201) *et seq.*), Article IV, Sections 51 and 52 of the Michigan Constitution, and under a common law nuisance theory, these claims are unnecessary to the resolution of this case.

the Ecorse Creek via the LeBlanc Drain and concluded that it did. (Kilmer testimony, P. Ex. 29). Prior studies of the Ecorse Creek Basis indicate that on an average, .40 inches of rain in the basin is sufficient to raise the water level in the LeBlanc Drain enough to cause the flap gates to open and thus result in a discharge of combined sewage into the Ecorse Creek. (Sprow testimony, P. Ex. 9, pp. 7-55 to 7-67).

On two occasions since the filing of this suit, DNR personnel have conducted field investigations at outfall 001. On the first inspection during March 30-31, 1980, an overflow was observed from outfall 001 to the North Branch of Ecorse Creek, which continued for over three hours following approximately .54 inches of rain nearby. On the second investigation, April 3-4, 1980, an overflow from outfall 001 to the North Branch of Ecorse Creek was observed, following approximately .59 inches of rain nearby, which overflow continued for over seven hours. (Woods and Miller testimony, P. Ex. 17, 20, 30). Under the conditions observed on April 4, 1980, the quantity of overflow from the LeBlanc Drain through outfall 001 amounted to approximately one-half the flow in the North Branch of Ecorse Creek upstream of outfall 001. (Miller testimony, P. Ex. 20).

Testing of samples of the overflow being discharged from the conduit showed that it contained excessive quantities of contaminants such as suspended solids, phosphorus[9], and fecal coliform, as well as excessively high biochemical oxygen demand ("BOD") (testimony of Willson, Woods and Canale, P. Ex. 17, Ex. 9, pp. 7-78 through 7-85, 7-87, 7-89, 7-90, 7-93, 7-94, 7-97).

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[9] The nutrient phosphorus in excessive quantities in water encourages increased biological activity, such as prompting high densities of blue-green algae. (Sprow testimony).

The water quality standard with respect to fecal coliforms specifies that waters in the classification applicable to Ecorse Creek shall contain not more than 1000 fecal coliforms per 100 millimeters. (R. 323.1062(1), P. Ex. 2, p. 39, Ex 22). Fecal coliform counts in the North Branch of the Ecorse Creek frequently exceed by many hundreds of times the maximum allowable fecal coliform level. (Woods, Willson, Kilmer and Canale testimony, P. Ex. 17, 24, 36, 37, 38).

Michigan Water Quality standards limit BOD in waters of inland streams to an amount which will maintain a minimum of five milligrams per liter of dissolved oxygen (DO) daily average with no single measurement of DO less that four milligrams per liter. (AACS 1973, R. 323.1064, P. Ex. 22). Dissolved oxygen concentrations in the North Branch of the Ecorse Creek are frequently below the minimum specified in this water quality standard. (Woods and Canale testimony, P. Ex. 9, 19, 24, 36, 37, 38). The organic bottom sludges deposited from combined sewer overflows exert a substantial oxygen demand even at times when there is no combined sewer overflow actually occurring. (Canale testimony, P. Ex. 24, 36, 37, 38). The high density of blue-green algae also exerts a considerable oxygen demand at night when no photosynthetic activity is occurring. (Woods testimony, P. Ex. 24).

Recent sediment sampling in April, 1980 by the plaintiffs' witness, Dr. Raymond Canale, indicates that conditions of the stream continue to be as degraded as in the earlier DNR study conducted in 1969 (P. Ex. 24), and that sludge worms are still the only animals inhabiting the North Branch of the Ecorse Creek. (Canale testimony, P. Ex. 35, 36, 37, 38). The evidence establishes that pollutants contributed by the City of Allen Park are

being discharged by defendants from outfall 001 into the North Branch of the Ecorse Creek.

The second factor, noncompliance with a permit condition, has also been clearly established by the evidence submitted by plaintiffs. NPDES Permit No. MI-0026204 requires the Wayne County Drain Commissioner to attain control of the combined sewer overflows at outfall 001 by March 31, 1982 and to complete construction of the Allen Park segment of the Element 2 plan. (P. Ex. 1). Contract specifications accompanying the bids for the Allen Park segment of Element 2 specify a needed construction time of two years, which was not rebutted by defendants. (Sprow and Trim testimony). EPA grant regulations require the grant agreement to contain a commitment to a schedule for construction of a project, 40 C.F.R. § 35.930 - 4(b), and such a commitment was made an explicit condition of EPA's approval of segmenting the Element 2 project in 1978. (Attachment C. Lindisch and Serpetti complaint). Consequently, the Wayne County Drain Commissioner, Charles Youngblood, agreed to begin construction of the Allen Park segment of the project by March 1, 1980 in order to comply with the March, 1982 deadline in the NPDES permit. (Attachment D, Lindisch and Serpetti complaint). The March 1, 1980 deadline was not met and construction has not yet begun.

Although defendant Allen Park argued that there was no conclusive proof that Allen Park contributed to the discharges from outfall 001, I find that plaintiffs have established by clear and convincing evidence that defendants have discharged and are discharging pollutants into the North Branch of the Ecorse Creek through outfall 001 and, by failing to proceed with the

funding and construction of Segment II of the Element 2 Final Plan, are in violation of NPDES Permit No. MI-0026204.

Remedy

Having found that defendants are in violation of NPDES Permit No. MI-0026204, the remaining issue to consider is the remedy to be imposed. Plaintiffs seek an order enforcing the terms of the NPDES permit, namely requiring defendants to proceed immediately with financing and constructing Alternative 1 of the Element 2 Final Plan. Defendant Allen Park raises three arguments challenging such a remedy. First, Allen Park alleges a procedural defect underlying EPA's grant approval and seeks an order requiring EPA to initiate preparation of a full Environmental Impact Statement pursuant to the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.*, or alternatively to prepare a proper Environmental Impact Appraisal. Second, the City argues that the approval of Alternative 1 of the Element 2 Final Plan and granting of funds by EPA and DNR are arbitrary and capricious actions. Finally, Allen Park contends that it is precluded from financing its local share of the project because of the law and Constitution of the State of Michigan.

NEPA Counterclaim

In a counterclaim, Allen Park contends that EPA has failed to meet the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA") in its preparation of the Negative Declaration and Environmental Impact Appraisal ("EIA"), which preceded EPA's decision to award a Step II grant for the Element 2 Final Plan. (Ex. A, Allen Park's Cross-Claim).

NEPA was enacted to encourage federal agencies to preserve and enhance environmental quality by mandating new procedural steps in administrative decision making. Environmental Impact Statements ("EIS") are required under NEPA for federal decisions which constitute "major Federal actions significantly affecting the quality of the human environment." NEPA § 102, 42 U.S.C. § 4332(C). Each federal agency is required to promulgate procedures for compliance with NEPA, NEPA § 103, 42 U.S.C. § 4333, and is responsible for determining whether an EIS is required for a particular action. EPA regulations contain general provisions regarding NEPA compliance, 40 C.F.R. § 6.100, *et seq.* (1976), as well as provisions specifically geared to NEPA compliance when EPA is considering proposed wastewater treatment works construction grants. 40 C.F.R. §§ 6.500-6.514. The regulations require the grant applicant to submit an environmental assessment as part of the Facilities Plan submitted to EPA. 40 C.F.R. § 6.512. EPA then reviews the assessment and other relevant information in deciding whether a full EIS or a Negative Declaration is required, applying the criteria in 40 C.F.R. § 6.200 and § 6.510.

In this situation, EPA determined that the project would not cause a significant environmental impact and issued a Negative Declaration and Environmental Impact Appraisal in accordance with 40 C.F.R. § 6.212. (Ex. A, Allen Park's Cross-Claim). These documents were made available to the public, including the City of Allen Park, on March 14, 1977, and the public was given fifteen days to file comments with the EPA on the Negative Declaration and EIA. 40 C.F.R. § 6.212(a). The City of Allen Park filed no objection to the Negative Declaration. Because the few comments submitted raised no

significant objections, EPA approved the final Facilities Plan and awarded the Step II grant.

The equitable doctrine of laches is applicable to suits brought unde NEPA. *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F. 2d 860, 867 (5th Cir. 1975); *Clarke* v. *Volpe*, 342 F. Supp. 1324 (E.D. La. 1972), *aff'd.*, 461 F. 2d 1266 (5th Cir. 1972). Three criteria must be met before laches will be applied to bar a claim. The party invoking laches must show a delay by the opposing party in asserting right or claim, that the delay was not excusable, and that there was undue prejudice to the party against whom the claim is asserted or, in this case, to the public interest that Congress seeks to protect. *Ecology Center of Louisianna, Inc.* v. *Coleman, supra*, at 867.

I conclude that laches should be applied to Allen Park's counterclaim in this suit. Allen Park has not hitherto raised any objections to EPA's Negative Declaration and Environmental Impact Assessment, either during the administrative commenting period beginning March 14, 1977, or by invoking judicial review of the agency decision and documents. Allen Park, to the contrary, had endorsed the project[10] (and petitioned the) Wayne County Drain Commissioner to initiate construction of Alternative 1 in June of 1977.

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[10] In a letter of January 4, 1977 to the Executive Director of the Southeast Michigan Council of Governments, Mayor Frank Lada of Allen Park expressed a "very strong recommendation" for the proposed Alternative 1 of the Element 2 Final Plan. (P. Ex. 2, App. H). Similarly, the minutes of a public hearing of January 27, 1977 on the Final Facilities Plan state that Mayor Frank Lada indicated that Alternative 1 was the "unanimous choice of himself and the Allen Park City Council." (P. Ex. 2, App. E, Summary of Hearing at 3). In fact, the Allen Park City Engineer was a participant in the preparation of the Facilities Plan. (Trim and Benker testimony).

The reason offered for the delay by Allen Park in raising objections to the plan is that city officials could not have known the "potential destructive effect" of the sewer separation plan until construction plans were finalized shortly before May of 1978, (Representation of counsel, Paragraph 12, Allen Park's Proposed Findings and Conclusions), and that they filed suit expeditiously in state court after that. However, the suit against the Drainage District, the Wayne County Treasurer and Drain Commissioner, and Wayne County, filed in August of 1978, challenged the project on financial grounds and raised no environmental objections at that time.

To allow Allen Park to proceed with its NEPA claim now would be prejudicial in several respects. Testimony at trial, including that of Allen Park's witness Alfred Benker, indicated that failure to complete the Allen Park segment of the project would be detrimental to the other two communities involved, Lincoln Park and Taylor, which had completed at least eighty per cent of their portions of the sewer separation project at the time of trial. The failure to complete the Allen Park segment of the sewer separation project would cause the stormwater system in Taylor to continue to contain sewage because of sewage flows from Allen Park along Pelham Road, and could result in odor problems from sewage sludge accumulating in the retention basin. In addition, continued conveyance of Allen Park's combined sewage to the Wyandotte Wastewater Treatment Plant will increase the load on that facility, which it may not be able to adequately treat, and will prevent Lincoln Park and Taylor from realizing their share of the reduction of about $200,000 in wastewater treatment costs that Segments I and II were planned to provide. (Trim testimony, P. Ex. 2, App. C). In addition to the other

communities involved in the project, the federal and state governments have detrimentally relied on Allen Park's earlier endorsement of the project in expending eighty per cent of the costs of the Lincoln Park and Taylor portions of the sewer separation project and in committing grant money for the Allen Park Segment, which is necessary for the success of the project.

The nature of the project for which Allen Park seeks procedural relief is an important factor in weighing the respective prejudice to the parties. Although entailing short-term disruption of neighborhoods and streets during construction of separate sewers, the long-term result of the Element 2 Final Plan will be improved water quality for the North Branch of the Ecorse Creek and other downstream bodies of water. Further delay will serve to prolong the degraded condition of the Creek. The procedural mandates of NEPA, though important, should not be used to obscure one of the congressional purposes in enacting NEPA — "to promote efforts which will prevent or eliminate damage to the environment . . .". NEPA § 101, 42 U.S.C. § 4321.

It is of some relevance to the balancing of interests that Allen Park's claims of environmental impact do not appear to be particularly substantial.[11] Allen Park does

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[11] Allen Park contends the Environmental Impact Appraisal and Negative Declaration are deficient for reasons which I have paraphrased as follows: (1) That EPA failed to take an independent look at the impacts and unduly relied on the plan prepared by firms with a financial stake in the project; (2) that costs are underestimated in the appraisal, and cost-effectiveness not discussed; (3) that the appraisal does not adequately consider alternatives, including a failure to consider subsequent changes in national policies and the "best management practices" outlined in a

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not suggest an alternative which will improve the water quality over that contemplated by the Element 2 plan. The only environmental impact Allen Park raises in its NEPA counterclaim is the short-term impact from construction, a concern which was addressed, albeit briefly, in EPA's Environmental Impact Appraisal. The City's concern about reconsidering different alternatives arises primarily from its desire to reduce the City's financial burden from this project. Although fiscal concerns are undoubtedly important to city decisionmakers, they do not warrant a remand of EPA's decision not to prepare a full EIS in this instance.

It is important that challenges to the administrative process under NEPA be raised in the formulative stages of a project so that subsequent steps are undertaken with a full appreciation of the risks. *Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1169 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *See Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 549-555 (1977). This is particularly so when the objecting party has been involved, as Allen Park was, in the planning of the project from its inception. As the court

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United States General Accounting Office document dated December 28, 1979, (Ex. B, Allen Park's Brief in Support of Review of Exhibit 2 [Element 2, Final Plan]); (4) that it fails to discuss the Element 3 study of stormwater treatment or a pending study of the Wyandotte Wastewater Treatment Plant and the possible impact that may have on the alternative of chemical treatment of combined discharge; (5) that the chosen alternative will not attain water quality standards; (6) that the impact from construction will be more severe than originally contemplated because of proximity to existing structures, and in some areas construction may be infeasible; and (7) that the specifications requiring contractors to obtain private construction easements will cause undue delays.

pointed out in *Washington Utilities and Transportation Commission, supra*, at 1169, there is a potential for abuse if parties objecting to a project are allowed to reserve an issue that might delay a project if all other attempts to stop it fail.

Consequently I find that Allen Park's NEPA counterclaim is barred by laches or estoppel. The City's delay in asserting its NEPA claim was not excusable and will cause undue prejudice to the public interest as defined by Congress and to the other parties affected which have detrimentally relied on Allen Park's prior support of the project. Even if Allen Park's claim were not barred by laches or estoppel, I would conclude that EPA's decision not to prepare an EIS was neither arbitrary nor capricious,[12] and that its Negative Declaration and Environmental Impact Assessment are legally sufficient.

Review of the Element 2 Final Plan

Separate from the question whether EPA's decision not to prepare a full Environmental Impact Statement was arbitrary or capricious, which I did not need to decide, is the question of the extent to which I can review the merits of EPA's and DNR's decisions to approve Alternative 1 of the Element 2 Final Plan and grant funds for its construction. EPA argues that such a claim should be barred because of a failure to exhaust administrative remedies under the Administrative Procedure Act of 1946 ("APA"), 5 U.S.C. § 701 *et seq.*

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[12] *See Mid-Shiawassee County Concerned Citizens* v. *Train*, 408 F. Supp. 650 (E.D. Mich. 1976), *aff'd mem.*, 559 F. 2d 1220 (6th Cir. 1977); *Bosco* v. *Beck*, 475 F. Supp. 1029 (D. N.J. 1979).

The DNR similarly points out Allen Park's failure to exhaust state remedies by its failure to request a DNR hearing on the proposed permit prior to its issuance, pursuant to MCL § 323.8(a) (MSA § 3.528(a)), or to seek judicial review of the DNR's issuance of the permit within the 60-day time limit of MCL § 24.304 (MSA § 3.560(204)). Allen Park argues that under the court's inherent powers to fashion equitable relief I should refrain from enforcing a remedy which is arbitrary and unreasonable, such as the plan which plaintiffs seek to have imposed.

Even assuming it is proper for me to review the decisions of DNR and EPA, it is not my function to review the alternatives *de novo*. Insofar as this enforcement proceeding concerns the violation of the terms of an NPDES permit, I am not free to ignore the permit conditions imposed by the DNR requiring construction of Alternative 1 of the Element 2 Final Plan and to substitute another plan. Rather, I am constrained to a more limited standard of review and can overturn the decisions of DNR and EPA in approving Alternative I only if those decisions are arbitrary, capricious or an abuse of discretion. I must consider whether the decisions were based on a consideration of relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). I cannot substitute my judgment as to the desirability of the chosen alternative for that of the agencies involved. *See Kleppe* v *Sierra Club*, 427 U.S. 390, 410 n. 21 (1976); *Bosco* v. *Beck*, 475 F. Supp. 1029 (D. N.J. 1979); *Mid-Shiawassee County Concerned Citizens* v. *Train*, 408 F. Supp. 650 (E.D. Mich. 1976), *aff'd. mem.*, 559 F.2d 1220 (6th Cir. 1976).

The plan finally proposed for implementation was the result of long and extensive study, which is evidenced by a series of reports prepared over a period of seven years. (p. Ex. 2, 6A, 6B, 9, 10, 11, 12, 13, 14 and 15). Public Hearings were held on December 9, 10 and 11, 1974, on the initial Facilities Plan for the Ecorse Creek Basin concerning whether or not the North Branch of Ecorse Creek should be enclosed. A public hearing on the final Facilities Plan was held January 27, 1977, following notice by publication and mailing to interested parties. (P. Ex. 2, App. E, Summary of Hearing, p. 3).

Despite its earlier endorsement of Alternative 1, Allen Park now contends that the imposition of that plan upon defendants would be arbitrary and capricious in several respects.

Allen Park alleges that insufficient data was collected regarding its contribution of combined sewage to the North Branch of Ecorse Creek and whether it was exceeding its purchased capacity in the Wyandotte Wastewater Treatment Plant to justify the large expense Allen Park will incur under the Element 2 Final Plan. I do not doubt that more data could have been gathered in the course of these studies. However, I find that there is sufficient evidence that Allen Park contributes some amount of combined sewage to the North Branch of the Ecorse Creek and that it is not arbitrary for DNR and EPA to require defendants to remedy discharges of sewage by separating the stormwater and sanitary sewer systems.

Another of the factors Allen Park points to as evidence of arbitrariness is that implementation of the Element 2 Plan will not achieve the objective of partial body contact standards of water quality in the North Branch of the

Ecorse Creek. The DNR and EPA cannot be required to remedy either all of a problem or none of it, and I do not find it arbitrary or capricious for those agencies to effect a partial improvement of the water quality of Ecorse Creek by means of this project.

Allen Park correctly indicates that Contracts 1 through 5 will be useless until the retention basin, the subject of Contract 13, is located and implemented. However, Allen Park did not persuade me that finding a location for such a retention basin was so unlikely and added such an element of uncertainty to the plan as to render it arbitrary and capricious.

Allen Park's claim that the plan is arbitrary beccause of the fact that the bids received were twice the amount of the estimates was premature at the time of trial. The DNR and EPA had not yet reviewed the bids at that time and hence there was no final agency action finalizing the cost of the project for a court to review. Allen Park filed no further objections following the approval of the low bids on Contracts 1 through 5 by DNR and EPA subsequent to trial;[13] hence there is no support for Allen Park's claim that Element 2 is arbitrary based on underestimated costs or excessive bids.

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[13] During the course of the trial the LeBlanc Tile Drainage District forwarded to the DNR its recommendation to award Contracts 1 through 5 to the low bidders. (D. Ex. 39). Subsequent to the trial, DNR recommended awarding only Contract 5 and rebidding Contracts 1 through 4 because of its concern with the high amount of the bids and the below number of bids submitted. A compromise solution was proposed by the DNR Grants Administration Section Chief Richard Hinshon, which involved selecting a disinterested, out-of-state bidder to make bids on Contracts 1 through 4, to see if the amounts submitted by the low bidders were within reasonable range. If that were determined to be the case, the contracts would be

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Allen Park's allegations of severe disruption of neighborhoods and physical danger to the citizens from extensive constructon did not impress me as indicia of arbitrary action. Counsel for Allen Park presented the testimony of an engineer, William Latsch, in an attempt to show the impossibility of construction in some of the narrow rights of way within the city. While pointing out some difficulties of sewer construction, given the site limitations, that witness did not contend that the construction of the project was physically impossible. (Latsch testimony, D. Ex. 47-52). The fact that construction will be more extensive and result in greater inconvenience to citizens and potentially greater damage to structures than initially anticipated is an inadequate basis in this case for a claim that agency action is arbitrary.[14] Furthermore, Allen Park should be held to a

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awarded to the original low bidders. A meeting was set up to establish the procedures for conducting the bidding by an independent contractor and to select that contractor. Attorneys in the case were invited to participate and asked to submit written requests to the Drainage Board if they wanted to attend. Allen Park attorneys did not make any written response. The DNR proceeded to select Roger J. Au & Sons, Inc., from Mansfield, Ohio, a contractor with no prior knowledge of the project or existing bids. Based on the figures submitted by this independent contractor, which exceeded the bids made by the low bidders on all contracts, the DNR recommended awarding Contracts 1 through 4 as originally bid, and the EPA endorsed that recommendation. See Tiplady testimony, June 20, 1980, transcript of meeting in chambers. Although Allen Park attorneys subsequently requested leave to file a motion to allow a discovery deposition of Mr. Au, the independent contractor, no such motion was ever submitted to the Court.

[14] Similarly, Allen Park's claim of severe economic upheaval to the citizens of Allen Park, because of the extensive disruption due to construction, is unsubstantiated. Allen Park provided no evidence upon which I can base any finding of an arbitrary or unreasonable impact from the alleged burden of providing extra municipal services while neighborhoods are disrupted by construction.

greater knowledge than the average citizen of the extent of its combined sewer system, and its claim of being surprised by the extent of construction causes some skepticism.

Allen Park has failed to establish that the imposition of the Element 2 Final Plan is arbitrary or capricious.

Financing the Local Share

In its answer in this lawsuit, Allen Park raised as a defense its inability to finance its local share because of the law and Constitution of the State of Michigan, specifically the recently-ratified Headlee Amendment to Article IX of the Michigan Constitution, and legislation implementing the Headlee Amendment. However, Allen Park submitted no brief on the subject nor did it offer any testimony to rebut that presented by plaintiffs' witness, Charles Moon, a prominent bond attorney and amicus curiae in this suit. I am persuaded by his testimony that funding for this project is not precluded by the law and Constitution of the State of Michigan.

Procedures for financing the Allen Park segment of the Element 2 project in existence at the time that the Headlee Amendment was ratified are set forth in Chapter 20 of the Drain Code, as amended, MCL § 280.461 *et seq.* (MSA § 11.1461 *et seq.*). The provisions governing levying of taxes to pay assessments of the Drainage District are found in Sections 474 and 475 of the Drain Code, MCL §§ 280.474 and 280.475 (MSA §§ 11.1474 and 11.1475), which provide:

> Sec. 474. *** The county board of commissioners of a county which has advanced money for a public corporation and which has not been reimbursed

> therefor, may order the public corporation and its officers to levy upon its next tax roll an amount sufficient to make the reimbursement on or before the date when its taxes become delinquent; and the public corporation and its tax levying and collecting officials shall levy and collect those taxes and reimburse the county. The foregoing shall not prevent the county from obtaining reimbursement by any other legal method. Assessments against the state shall be certified to the state highway commission and paid from state highway funds. The tax levying officials of each of the other public corporations assessed shall levy sufficient taxes to pay assessment installments and interest as the same become due unless there has been set aside moneys sufficient therefor.
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> * * * *
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> Sec. 475. Taxes levied by a public corporation for the payment of assessments hereunder shall not be deemed to be within any statutory or charter tax limitation. A public corporation may impose taxes without limitation as to rate or amount for the payment of the assessments in anticipation of which bonds are issued, which taxes shall be in addition to any taxes that the public corporation may otherwise be authorized to levy but not more than the rate or amount sufficient therefor.

Alternatives to ad valorem taxes as a means of raising funds to pay the assessment installments are authorized in Section 490 of the Drain Code, MCL § 280.490 (MSA § 11.1490), as follows:

> Sec. 490. If the legislative body of a public corporation, which shall have been assessed under

> this chapter, shall determine that a part of the lands therein will be especially benefited by the drain project to the extent of any portion of the amount so assessed, then it may cause such portion to be assessed, according to benefits, against the especially benefited lands, provided such special assessment method of financial is not inconsistent with local financing policy as to similar drains and sewers . . . In lieu or or in addition to levying special assessments, the public corporation under the same conditions and for the same purpose may exact connection, readiness to serve, availability of service charges to be paid by owners of land directly or indirectly connected with the drain project, or any combination thereof.

Another act existing prior to the Headlee Amendment is the Court Order Bond Act, MCL § 123.247 (MSA § 5.2667), which is also applicable to projects of this sort. It provides:

> Sec. 7. (1) In accordance with and to the extent authorized by law, when the water resources commission, the department of natural resources or the department of public health has ordered, or *when the water resources commission has issued a permit, or when a court of competent jurisdiction in the state* has ordered the installation, construction, alteration, improvement or operation of a sewage system, solid waste facility, or waterworks system, in any of the governmental agencies or municipalities herein mentioned, *and the plans therefor have been prepared, and approved by the state department* or commission having the authority by law to grant the approval, *the legislative body or the* respective legislative bodies thereof *may issue and*

sell the necessary bonds for the construction, installation, alteration, operation or improvement thereof, including the treatment works, and such other facilities as may be so ordered or *set forth in the permit as being necessary* to provide for the effective operation of the system. This provision shall be construed to allow a governmental agency or municipality the option of selling bonds under a water resources commission order or permit, or a department order, or taking or permitting the matter to go into court and selling bonds under a court order. The bonds shall bear interest at not to exceed the maximum rate permitted by Act No. 202 of the Public Acts of 1943, as amended, being sections 131.1 to 138.2 of the Michigan Compiled Laws, and be payable in not to exceed 40 years from the date of issuance. The legislative body or the respective legislative bodies shall determine the denomination of the bonds and the date, time, and manner of payment. *The amount of the bonds either issued or* outstanding *shall not be included in the amount of bonds which the* government agencies or *municipalities may be authorized to issue* under any statutes of this state or charters. Governmental agencies or *municipalities issuing bonds hereunder may raise such a sum annually by taxation as the legislative body* or respective legislative bodies *may deem necessary to pay interest on the bonds, and to pay the principal thereof as it falls due. The annual amount may be in excess of the authorized annual tax rate fixed by the statutes or charters.*

(2) Except as otherwise provided in this act, all bonds issued hereunder shall be issued and sold in conformity to Act No. 202 of the Public Acts of 1943,

> as amended. *Court ordered bonds shall not require voted approval of the electors* and shall not be subject to section 5(g) of Act No. 279 of the Public Acts of 1901, as amended, being section 117.5 of the Michigan Compiled Laws, as to publication of notice, petition and referendum. Bonds other than court ordered bonds issued under this act shall require voted approval of the electors only if an appropriate petition is filed in accordance with the law. [emphasis added].

Cases prior to the effective date of the Headlee Amendment establish that general law of the state is part of the charter of a city or a village. *See City of Jackson* v. *Vedder*, 209 Mich. 291, 294 (1920); *Amberg* v. *Welsh*, 325 Mich. 285, 293 (1949); *City of Hazel Park* v. *Municipal Finance Commission*, 317 Mich. 582, 601 (1947). Under the 1963 Michigan Constitution prior to the Headlee Amendment, there had been no constitutional tax limitation upon charter authorities, such as Allen Park; the only limitations were those contained in the charters of the governmental unit or in the general law of the State of Michigan enacted by the legislature. *Butcher* v. *Township of Grosse Ile*, 387 Mich. 42 (1972). The Drain Code and Court Order Bond Act, as general laws of the state, were incorporated in the charters of governmental units, and authorized unlimited taxes for payment of debt incurred for reasons of public health.

To what extent, if any, was the state of the law altered by the Headlee Amendment, formally known as Proposal E? The Headlee Amendment, which was ratified at a general election in 1978, amends Article IX, Section 6, of the 1963 Constitution of the State of Michigan and adds new Sections 25 through 34 to Article IX of the

Constitution (effective December 22, 1978).[15] Paragraph 1 of Article IX, Section 6, establishes a 15 mill limitation on general ad valorem taxes, except as otherwise provided in the Constitution. The second paragraph, amended by Proposal E, grants an exception to the 15 mill limitation as follows:

> The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds APPROVED by the Electors or other evidence of indebtedness approved by the Electors or for the payment of assessments or contract obligations in anticipation of which bonds are issued approved by the electors, which taxes may be imposed without limitation as to rate or amount; or, subject to the provisions of sections 25 through 34 of this article, to taxes imposed for any other purpose by any city, village, charter county, charter township, charter authority or other authority, the tax limitations of which are provided by charter or by general law.

Upon referring to newly-added Sections 25 through 34 of Article IX, Section 31 is found to be the relevant section imposing a constitutional tax limitation on cities. It provides that

> *Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or*

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[15] To implement the Headlee Amendment, the Michigan legislature subsequently enacted several amendments to the Municipal Finance Act, MCL § 131.1 *et seq.* (MSA § 5.3188(1) *et seq.*). *See* MCL §§ 131.2, 131.4, 137.1a (MSA §§ 5.3188(2), 5.3188(2.2), 5.3188(45a)).

> *charter when this section is ratified,* without the approval of a majority of the qualified electors of that unit of Local Government voting thereon . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [emphasis added].[16]

Section 31, by its terms, does not apply to taxes already authorized by law or charter when the section is ratified. Chapter 20 of the Drain Code and the Court Order Bond Act were in existence when Section 31 was ratified and at that time authorized imposition of unlimited taxes for the payment of debt incurred for reasons of public health. The tax levy provisions of the Drain Code have not been amended by the legislature since the passage of the Headlee Amendment. Thus I conclude that Allen Park is not prevented by the law and Constitution of Michigan from financing its assessed portion of the project without public referendum. Allen Park will be required to provide funds to meet its

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[16] The Allen Park segment of the Element 2 project is not one which can be considered pre-Headlee pursuant to the grandfather clause in the second paragraph of Section 31. Application was made to the Municipal Finance Commission for approval of bonds and permission to sell them following apportionment and adoption of an assessment roll on the project in the spring of 1978. However, as part of the settlement of the litigation brought by Allen Park in Wayne County Circuit Court in August, 1978, the application for issuance of drain bonds for the Allen Park segment was rescinded September 19, 1978. *See* MCL § 131.4 (MSA § 5.3188(2.2)), which defines what obligations are to be considered pre-Headlee under Paragraph 2 of Section 31, above.

assessed obligation for its share of the Element 2 project, which may include, but is not limited to, the levying of a tax without limitation as to rate or amount on all taxable property in its jurisdiction.

Conclusion

The evidence produced at trial by plaintiffs, all of whom have standing under FWPCA, establishes by clear and convincing evidence that Allen Park contributes to the combined sewer overflows being discharged into the North Branch of Ecorse Creek. The failure of the defendants, Wayne County Drain Commissioner Charles Youngblood, the LeBlanc Tile Drainage District, the Drainage District for Ecorse Creek Pollution Abatement Drain No. 1, and the City of Allen Park to undertake the necessary actions to comply with the construction schedule contained in NPDES Permit No. MI-0026204 constitutes a violation of FWPCA § 301(a), 33 U.S.C. § 1311(a), and the Michigan Water Resources Commission Act, MCL § 323.7(1) (MSA § 3.527(1).

Allen Park's counterclaim against EPA alleging non-compliance with NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C), is dismissed because of laches or estoppel. The NPDES permit condition requiring construction of the Element 2 Final Plan, which plaintiffs seek to enforce, is not arbitrary or capricious, nor is Allen Park barred from financing its share of the project.

Because of Allen Park's refusal to proceed with financing its segment of the project, plaintiffs are entitled to injunctive relief compelling financing and construction of the Allen Park segment of the Element 2

Final Plan, a project determined necessary for the public health.

A final order to this effect has been entered.

/s/ John Feikens
Chief United Sates District Judge

November 6, 1980

DEFENDANT, CITY OF ALLEN PARK'S, CROSS-CLAIM AGAINST DEFENDANT, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

(United States District Court
Eastern District of Michigan
Southern Division)

(Greenfield Construction Company, Inc., et al.
v City of Allen Park, et al.)

(Filed April 14, 1980)

NOW COMES Defendant, City of Allen Park and for its Cross-Claim against Co-Defendant, Administrator of the United States Environmental Protection Agency, shows unto this Court the following:

1. That Defendant and Cross-Claimant, City of Allen Park (hereinafter "Allen Park"), is a municipal corporation which has been named as a Defendant in the case-in-chief in said cause on the allegation of several potential contractors purported to arise under the Federal Order of Pollution Control Act Amendments of 1972 [33 U.S.C.A. §1365(a)].

2. That the project involved within the context of the litigation presently before this Court is variously known as the Ecorse Creek Pollution Abatement Project-Element II, as set forth in the final Facilities Plan dated February, 1977, and which has likewise been identified by Cross-Defendant as EPA Project No. C262436 (hereinafter the "Project").

3. Cross-Defendant, Administrator of the United States Environmental Protection Agency (hereinafter "EPA"), is the federal agency involved in granting construction assistance funds for the Project and is likewise the agency responsible and subject to the specific duties of the National Environmental Policy Act of 1969 (49 U.S.C. § 4321, *et seq*).

4. That this Cross-Claim arises on the basis that the actions of EPA involve major federal action significantly affecting the environment within the meaning of NEPA and, in particlar, § 102 thereof (42 U.S.C. § 4332) and by virtue of the actions of said EPA under the Clean Water Act Amendments of 1972 and the rules and regulations promulgated by the Council of Environmental Quality pursuant to the mandates of NEPA.

5. That the subject Project includes major far-reaching programs for eventual abatement of pollution of the Ecorse River and its north and south upper tributaries and includes major sewer separation programs particularly within the City of Allen Park, along with construction of major facilities, diversion of existing conveyance mechanisms, additional storm water loading on the south branch of the Ecorse Creek, variations in loading characteristics for the Wayne County-Wyandotte Sewage Treatment Plant, as well as construction of several open sanitary and storm retention basins located primarily in residential areas.

6. That the construction elements alone within the City of Allen Park for sewer separation involve bid prices in excess of $37,000,000.00 and will involve easements and construction across literally dozens of parcels of private property and likewise, will result in a severe and significant economic impact upon the City of Allen Park, its ability to provide fire, police and other protective services, as well as upon the individual citizens of Allen Park.

7. That the clear language of NEPA (§ 102) and the regulations promulgated by the Council of Environmental Quality for implementation of NEPA standards clearly require the preparation and filing of a full environmental impact statement for actions such as involved in the present Project, involving major federal action of significant effect upon the environment. C.F.R. § 6.200(a), the regulations which were in effect up until July, 1979, clearly state the requirements for the filing of a full environmental impact statement. Sub-paragraph (a) provides as follows:

> "An action with both beneficial and detrimental effects should be classified as having significant effects on the environment even if EPA believes that the net effect will be beneficial. However, preference should be given to preparing EIS's on proposed actions which, on balance, have adverse effects."

8. In addition, said § 6.200, C.F.R. likewise provides that even minor actions which may set a precedent for future major actions with significant impacts must be the subject of an environmental impact statement. (C.F.R. § 6.200[3]).

9. That the Project involved in this case, aside from the reasons already stated, does involve major federal

action significantly affecting the environment for the following additional reasons, among others:

a. That the amount of monies involved in Element II of the proposed Ecorse Creek Pollution Abatement Project exceeds $37,000,000.00 for construction within the City of Allen Park alone, and exceeds $70,000,000.00 to $75,000,000.00 for the remainder of said Element II.

b. That the actual construction with the City of Allen Park alone involves major disruption of many residential and arterial streets and would include disruptions for residents, fire and police vehicles and, further, that said construction would involve danger from caveins and vibration damage to many older residential and accessory structures within said City of Allen Park.

c. That the fiscal impact upon the City of Allen Park would be great and that the ability of said City of Allen Park to finance this Project as presently comtemplated would impose severe strain impact upon the City and its citizens.

d. That the subject Project is but part of an overall project under consideration for ultimate attainment of water quality objectives for Ecorse Creek and that such other components include an Element III Proposal for treatment of Ecorse Creek basin storm water runoff, a project involving many millions of dollars and alteration of land uses; as well as a present study project under consideration for examination and review of the Wyandotte Treatment Plant and its tributary conveyance and interceptor systems.

e. That the subject Project involves many communities, has been the subject of much public

debate, and attempts to cut across many established geo-political boundaries.

f. That the subject Project has a significant impact upon existing drainage, storm and treatment facilities.

g. That the subject Project will involve the creation of open lagoons to be built in largely urbanized residential areas with attendant problems from potential odors, danger of overflows and other potential health hazards.

h. That the subject Project will involve substantial changes in land use, will affect property values and consequently will affect the desirability and saleability of many existing properties for present or future intended uses.

i. That the subject Project represents a major alteration of the inflow characteristics to the north and south branches of the Ecorse Creek and consequently to the Ecorse River by reason of proposed complete separation and diversion of all urban storm water and surface runoff into these bodies of water.

j. That this subject Project has been under consideration for many years and has involved many alternatives, including such drastic measures as the total enclosure of the north branch of the Ecorse Creek and that these alternatives have been the subject of much public debate and controversy and many have been discarded, modified and abandoned.

10. That EPA has a clear legal duty and obligation to carry out the mandates of NEPA and to comply with the Council of Environmental Quality guidelines as set forth above, but that said EPA has failed and neglected to carry out its said duties and obligations and, further, has

simply chosen to rely upon a Facilities Plan prepared by persons having a financial interest in the continuation of the proposed Project and that said EPA has totally failed and neglected to insure the fulfillment of the congressional mandate that all agency actions and determinations be based upon sound environmental consideration.

11. That the statements, findings, reasons and explanations promulgated by Cross-Defendant, EPA, in its Environmental Impact Appraisal (revised) clearly cannot and do not justify the failure of said Cross-Defendant, EPA, to prepare a full environmental impact statement in accordance with the CEQ guidelines and the clear mandates of NEPA and, in particular, § 102 and portions thereof.

12. That the Environmental Impact Appraisal prepared by EPA for the subject Project, as appended hereto as Exhibit A, is clearly inadequate in that it, and the summary required under CEQ guidelines clearly fails to advise interested persons as to the true extent, nature and significant effect and consequences of the proposed Project.

13. That said Environmental Impact Appraisal (Exhibit A) is further inadequate, inaccurate, and fails to meet the minimum standards required by NEPA and CEQ guidelines, in particular, for failing to assess site specific impacts of said Project within the City of Allen Park where the majority of Project construction is to take place, by making only general assessment on a large area-wide basis and especially in view of the fact of the significant impact of said Project upon the City of Allen Park and its citizens and the physical impact of construction within Allen Park upon many individual private property owners.

14. Further, said Environmental Impact Appraisal fails to evaluate the consequences of said Project upon the City of Allen Park and its citizens and likewise has failed to consider any alternatives, including no action, with regard to the city of Allen Park.

15. Further, that said Environmental Impact Appraisal is inadequate and fails to comply with the minimum requirements of CEQ guidelines and NEPA mandates in that said Appraisal does fail to discuss or even mention the anticipated further allocation of substantial resources in attempting to achieve water quality standard objectives for the north branch of Ecorse Creek (partial body contact) and as a consequence thereof, does not provide any reasonable or rational cost effective approach since the Appraisal would appear to deal with alternatives which do not and cannot of themselves achieve such water quality standard objectives and said Appraisal fails to disclose the further resources which will be necessary in order to achieve said objectives and to meaningfully analyze the costs and environmental impact from such further anticipated projects.

16. Further, and in addition to the above, said Environmental Impact Appraisal does not and cannot properly excuse Cross-Defendant, EPA, from preparing an environmental impact statement as required under NEPA and CEQ guidelines and that said Environmental Impact Appraisal is additionally inadequate, illegal and improper for the following reasons, among others:

a. That said Appraisal does not reflect any sound, reasoned agency decision, but rather, would appear to rely solely upon the final Facilities Plan of February, 1977, which was self prepared by engineering firms

having a substantial contingent financial interest in the continuation of the proposed Project.

b. That said Appraisal obviously reflects no independent evaluation on the part of EPA, nor does said Appraisal reflect any sound judgment on the part of said EPA, consistent with CEQ guidelines and NEPA mandates.

c. That said Appraisal contains a serious under-estimation of Project costs and contains no meaningful discussion or information with regard to cost effectiveness for the chosen alternative.

d. That said Appraisal unduly limits and restricts the potential alternatives, relying solely upon those developed in the Element II Facilities Plan.

e. That said Appraisal fails to advise members of the public and does not appear the agency did take into account the proposed Element III Project involving massive land use changes, diversion and treatment of storm water and creation of on-line semi-treatment lagoons.

f. That said Appraisal does not advise the public of a present Grant Study underway for evaluation of the Wyandotte Waste Water Treatment Plant, but simply contains the assumption that the alternative of total chemical treatment of combined discharge from the City of Allen Park would be too costly. That this assumption is now being evaluated pursuant to a Step I Study Program on behalf of Wayne County Department of Public Works, owner of the Wyandotte Waste Water Treatment Facility.

g. That said Appraisal leads one to believe and is misleading to the effect that the chosen alternative will eventually attain water quality standards while, in fact, the chosen alternative could never, without subsequent surface water treatment, attain water quality standards described.

h. That said Appraisal fails to describe the fact that all construction and contract work within the City of Allen Park will be upon easements provided by private contractors rather than by the sponsoring agency which may lead to unduly hampered working conditions, as well as delays through private litigation between contractors and homeowners, all of which may result in substantial extra costs, as well as substantial delays in completion of said construction within the City of Allen Park.

i. That the Appraisal presupposes a benefit to the Wyandotte Treatment Plant yet the mechanics and hydraulics of the Wyandotte Treatment Plant are presently first being studied pursuant to Step I Study Program sponsored by the Wayne County Department of Public Works.

j. That the Appraisal fails to meaningfully discuss Element III, a multi-million dollar subsequent contemplated project for treatment of storm water in order to attain the stated water quality objectives.

k. That said Appraisal fails to properly construe the term "significant" impact in accordance with C.F.R. § 6.200(a) which requires an environmental impact statement where there is any significant impact, whether beneficial or detrimental.

17. That said Cross-Defendant, EPA, has the affirmative duty to carry out and fulfill the directions and mandates of Congress as expressed in NEPA and as further supplemented by the regulations promulagated by the Council of Environmental Quality, all of which are designed to protect the public, to protect the environment and to insure that such agency action as is herein involved will be consistent with meaningful cost effectiveness studies and designed to maximize efficient use of resources and protection of the environment.

18. That as set forth above, EPA has failed in this instance to carry out and perform such duties and obligations.

CONCLUSION AND PRAYER

WHEREFORE, Defendant-Cross-Plaintiff, City of Allen Park, prays this Honorable Court will enter its Order directing Cross-Defendant, Administrator of the United States Environmental Protection Agency, to:

1. Immediately and forthwith initiate preparation of a full environmental impact statement covering all elements and phases of the north branch of the Ecorse Creek Pollution Abatement Project in accordance with the requirements of NEPA, § 102 and the rules and regulations promulgated thereunder by Council of Environmental Quality.

2. Determine the Environmental Impact Appraisal, dated March, 1977, prepared by Cross-Defendant, EPA, is inadequate and in the alternative, that this Court require said Cross-Defendant to forthwith prepare a proper Environmental Impact Appraisal consistent with

the mandates of NEPA and the rules and regulations promulgated thereunder.

Respectfully submitted,

Attorneys for Defendant and Cross-Claimant, City of Allen Park

PAGNUCCO & KRUSE

By/s/ KENNETH D. KRUSE (P16271)
7000 Roosevelt Avenue, Suite 100
Allen Park, MI 48101
(313) 386-1111

FEILER AND GLASS, P.C.

By: /s/ MICHAEL H. FEILER (P13340)
32969 Hamilton Court, Suite G 100
Farmington Hills, MI 48018
(313) 553-9300

Dated: April 10, 1980

Best Copy Available

Date 2-19-80

ROUTING AND TRANSMITTAL SLIP

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. ELIZABETH HOFMANN		
2. Michael Feiler & Assoc		
3. 32969 Hamilton Court Suite G100		
4. Farmington Hills MI 48018		

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

Elizabeth:

A copy of the March 1977 Negative Declaration and Environmental Impact Appraisal are enclosed as discussed with you earlier today. A few letters were received in response to the Negative Declaration and were answered promptly.

The Appraisal was based mainly on the Facility Plan prepared by Drainage District (which is chaired by the Drain Commissioner) and its consultants

Wade, Trim and Associates,
L. N. Hayden
and Pete Hinn and Bogue

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
George Hamper	Phone No.

5041-102

EPA REGION V
FACILITIES PLANNING BRANCH

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region V
230 South Dearborn St.
Chicago, Illinois 60604

Mar. 14, 1977

TO ALL INTERESTED GOVERNMENT AGENCIES AND PUBLIC GROUPS AND CITIZENS:

In accordance with the procedures for the preparation of environmental impact statements (EIS), an environmental review has been performed on the proposed EPA action identified below. A summary of the project and its major impacts and a location map are attached.

Name of Applicant: (City/County/State) North Branch of Ecorse Creek, Drain Improvement Drainage District, Wayne County, Michigan C262436 01

Planning Area: Ecorse Creek Basin

Proposed Project(s): Allen Park, Lincoln and Taylor separation of combined sewers, $22.6 million
Taylor — Storm sewer and diversion 9.3 Million
Infiltration — Inflow removal 3.3 Million
Storage Facilities 7.8 Million

Estimated Project Cost: Approximate total: $43 Million

Potential Agency Financial Share: $27.2 Million

The review process has shown that significant environmental impacts which would warrant preparation of an EIS will not result from the proposed action. Any significant adverse impacts have either been eliminated by making changes in the project or resolved through mitigative measures. Consequently, a preliminary decision not to prepare an EIS has been made. This action is taken on the basis of a careful

review of the facilities [*sic*] plan, including the environmental assessment, and other supporting data, which are on file in this office with the environmental impact appraisal and are available for public scrutiny upon request. Copies of the environmental impact appraisal will be sent upon request.

Comments supporting or disagreeing with this decision may be submitted for consideration by EPA. After evaluating the comments received, the Agency will make a final decision; however, no administrative action will be taken on the facilities [*sic*] plan and/or project for at least fifteen (15) working days from the date of this notice.

Sincerely yours,

/s/ Kent Fuller
Chief, Planning Branch

PROJECT SUMMARY

1. Project Location/Environmental Setting: (See attached map) Project is located west of Detroit in the cities of Lincoln Park, Allen Park and Tylor. Cities are densely developed. Land use zoning is primarily residential (45%), commercial and industrial (15%) and open space (39%). Construction of proposal is throughout residential area.

2. Purpose of Project: To eliminate combined sewer overflows to the LeBlanc Drain, and Ecorse Creek thereby alleviating pollution discharge to the Creek and enhancing water quality. Construction of facilities include: Sewer separation (construction of storm sewers), 3 retention basins to store excess sanitary flow and 1 storage facility to reduce peak discharge rate of diverted storm water to the Sexton-Kilfoil Drain thereby controlling possible flooding in the Drain.

A. Proposed Design Capacity: *10 year Storm for all Facilities*

B. Present Population: *175,000 (Approx.)*

C. Length of sewers to be constructed, if any: *14 miles storm, 14 miles sanitary.*

D. Number of stream crossings, if any: *None*

3. Nature and Extent of Land Use Changes

1. Site: Sewer separation will be accomplished by construction storm sewers in some areas and utilizing the combined sewer as a sanitary sewer; and building a sanitary sewer in other areas and utilizing the combined sewer as a storm sewer, depending on which method is cost-effective. The 3 storage basins will be built in residential areas where vacant land is available. All sanitary flow will continue to be treated at the Wyandotte wastewater treatment plant.

2. Sewer Routes: Construction of sewers will be parallel to existing sewers routes, thereby not inducing land use changes. Capacity will be for existing population.

4. Major Primary and Secondary Impacts of the Project:

A. Primary/Construction-Related: Reduction of approximately 85% B.O.D. discharge into Le Blanc Drain and Ecorse Creek, thereby improving water quality. Reduction of localized basement flooding. Construction will cause temporary adverse impacts especially in residential areas. These impacts would include traffic congestion, noise and inconveniences for residents.

B. Secondary: Reduction of pollution loading in the Detroit River where Ecorse Creek drains, providing a basis for a long term program to abate pollution in order to attain the designated use of the stream (fishable, swimmable), reduce odors along the water-ways, reduction of loading on the Wyandotte treatment plant and thus the capability to adequately treat the flows for which the plant was designed. Retention facilities may experience occasional odors.

C. Rate of Projected Population Growth: one (%/YR)

ENVIRONMENTAL IMPACT APPRAISAL (REVISED)

Project Cost: $45,672,000 Project #C 262436

I. General Information

A. Legal Name and Address of Responsible Agency

North Branch of Ecorse Creek Drain
Improvement Drainage District
900 West Lafayette
Detroit, Michigan 48226

B. State Agency Representative:

William Turney

C. Authorized Representative's Name and Title:

Charles Youngblood, Drain Commissioner

D. Receiving Water: Ecorse Creek

II. Present Environmental Setting

A. Briefly describe any significant features in the planning area under consideration.

Area is drained by Ecorse Creek and LeBlanc Drain which eventually flows to the Detroit River. At the confluence of the creek and drain is a marina. The area is almost fully developed.

B. Actual growth rate of population: 8.7% (10 yr. 1960-70;

C. Describe any land use features which could be impacted by the proposed project.

The project will not change current land-use, but will enhance living conditions and

property values since flooding will be alleviated and odors reduced.

D. Summarize present water quality conditions in the planning area:

Ecorse Creek is designated for recreation and partial body contact. Ecorse Creek is the most polluted stream in Michigan. Overflows from the combined sewers contributes an estimated loading of almost 2 million pounds B.O.D. per year. 12 overflows exist along the creek and LeBlanc Drain. Additionally, when wet weather flow reaches the Wyandotte treatment plant, flow in access of 100 MGD is bypassed to the Detroit River.

E. Identify any sensitive environmental areas, endangered species habitat, and/or significant cultural resourses:

None in proposed service area.

III. Alternatives and Proposed Project(s)

A. Briefly describe the feasible alternatives for water quality management considered in the facilities plan:

1. Separation of combined sewers — install storm sewers
2. Operational control of existing system (storage within system)
3. Storage by retention basins and treatment of combined sewer overflows.
4. Dual use — store overflows at a central site and dewater through existing interceptor at a controlled rate.

Number 1 was the selected alternative.

B. Briefly, indicate basis for accepting or rejecting:

1) biological or physical-chemical treatment

Expanding Wyandotte treatment plant to contain overflows (including an interceptor for conveyance) — high cost.

2) treatment and reuse

Not applicable for treatment of overflows

3) land application techniques

Land is not available in the urban area. Costs would be extremely high and not socially acceptable.

C. Consideration of the no-action alternative demonstrated that:

The rate of overflows would increase including the volume and duration, and Ecorse Creek would continue to be the worst polluted stream in the state. Benthic deposits would continue to accumulate and the Detroit River would be adversely affected to a greater degree.

D. Briefly describe the primary and secondary, beneficial and adverse, short and long term environmental impacts considered in the cost-effective analysis, as well as any proposed mitigative measures.

1. Estimated B.O.D. removal/year = 1.99 million lbs. = 84.5% removal
2. Reduction of obnoxious odors along the creek. Enhancement of water quality of Ecorse Creek as well as the Detroit River.
3. Chosen alternative will provide a basis for continuation of a pollution abatement

program (sewer separation) with the ability to eventually attain the goals of partial body contact.

4. Basement surcharging will cease in the area.

E. Describe sludge disposal alternatives and indicate location of ultimate disposal.

Not applicable to this project.

F. Describe briefly any impacts on wetlands, floodplains, coastal zones, wild and scenic rivers, threatened or endangered species, or other environmentally sensitive areas.

Project includes sewer separation in the urban area — no impact on any of the above. Sedimentation and erosion to the waterways will be slight, since only storm water outfalls will be constructed to the creek and drain. Sewers will not be routed parallel to the waterways. The creek itself will not be altered or physically changed.

G. Briefly discuss any irreversible or irretrievable commitment of resources:

Pump stations will require fuel; however removal of excessive inflow will be a cost savings in that the Wyandotte treatment plant will have less loading.

H. Projected growth rate of population: One (%/yr.)

IV. Public Participation

A. Describe any public participation other than required hearing.

Numerous letters and media coverage. Some groups participated throughout the 3 year

planning period: i.e. Michigan United Conservation Club, Preserve the Ecorse Creek Association, Lake Erie Clean-Up Committee, League of Women Voters and concerned citizens.

B. Summarize any significant issues raised at the public hearing or through other means:

Three public hearings 1974-76 were held previous to the final hearing (January 1977). Communities objected to the high costs (1974-1976). At the final hearing all concerned groups and citizens accepted the proposal and agreed that the benefits were worth the costs.

V. Reasons for concluding there will be no significant impacts.

The preferred alternative will remove the highest amount of pollution proportional to costs. The long time involved in developing the plan involved much public input — direct in meetings and indirect through letters read at the public hearing. The proposed sewer separation will not only attain water quality benefits to the streams but the city will also attain the benefit of eliminating basement surcharging. The construction of 3 storage facilities will require land acquisition. The benefits of reducing overflows and basement surcharging are worth the short term affects produced by storage of sanitary flows. The environmental impacts are limited to the cities and will be due to construction which could be a nuisance to residents for a short time.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

* * *

(3) "A party may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

What this rule permits, also, is a realignment of the parties. And it seems to me that what must be done in this case — and I think this is completely consummate with the pretrial conference that we had last week — is that there ought to be a realignment of the parties. As I see it, the real Defendant in this case is the City of Allen Park, the Leblanc Tile Drainage District, the Drainage District for Ecorse Creek Pollution Abatement Drain Number One, and Charles N. Youngblood, the Wayne County Drain Commissioner. Parenthetically I point out that there seems to be some real merit in the position of the County of Wayne, which itself is named as a Defendant, that it perhaps has little or no place in this law suit. But it seems to me that this Michigan Department of Natural Resources and EPA ought to be considered to be parties Plaintiff under Rule 21 and that the case then would be in the posture in which I think our pretrial conference and the pleadings really state.

* * *

(30) *Continued Direct Examination*

By Mr. Emery:

Q. With respect to the permit with the State of Michigan Exhibit Number One, Mr. Zugger, just in a summary fashion, would you point out the pertinent

enforcement provisions and indicate at what portion of the document those requirements with respect to the pollution are found?

A. Okay. Page one of the document states that,

> "The Wayne County Drain Commissioner, acting for and on behalf of the LeBlanc Tile Drainage District, serving the cities of Allen Park, Lincoln Park, and Taylor is required to utilize to the maximum extent possible available receiving sewerage system transportation capabilities for the delivery of combined sewage to treatment facilities and for an interim period during which an effective combined overflow control program is to be implemented as established herein the permitee [*sic*] —"

The Court: Well, this is all in the body of the permit.

Mr. Emery: It is all there. I want (30-a) him to summarize.

* * *

(32) * * * Mr. Emery: I have a copy of the facilities Planning Study Pollution Abatement of Ecorse Creek 2C2624316-01, the Element Two Combined Sewer Final Plan, over the title of Charles N. Youngblood, dated February, 1977, and I would like to have that marked as State of Michigan Exhibit Number two, please.

(State of Michigan Exhibit Number two marked for identification.)

Q. (By Mr. Emery): Mr. Zugger, I showed you one volume which has been marked as Plaintiff State of Michigan Exhibit Number Two. Was that the Element Two Facility Plan referred to in the Sate of Michigan Exhibit Number one?

A. Yes, it is.

Q. All right. Now, with respect to the permit, would you describe for the Court which entities, which organizations, are covered by the permit for the purpose of pollution control?

A. The permit was issued, as I stated, to the Wayne County Drain Commissioner acting on behalf of the LeBlanc Tile Drainage District, serving the cities of Allen Park, Lincoln Park, and Taylor.

* * *

(38) * * * Mr. Emery: I move that into evidence at this point.

The Court: Any objections?

Mr. Feiler: Your Honor, I did suggest that exhibit two be marked because we are going to be referring to it. I cannot consent to its admission into evidence at this time.

The Court: What is your objection.

Mr. Feiler: The objection is that it constitutes hearsay. It is the testimony, statements of other —

The Court: Overruled. It may be admitted. Any further Plaintiff's questions?

Mr. Downs: No further questions.

The Court: Mr. Overman?

Mr. Overman: I have nothing further.

The Court: Mr. Feiler?

Mr. Feiler: Your Honor, would this be an appropriate time for me to compare the original of that permit?

The Court: If you wish. Do you have the original there?

* *

(67) Mr. Emery: Your Honor, we have individuals here who will testify as to studies done within the last two weeks.

The Court: Well, for the limited purpose of Mr. Sprow's ability to testify, I will admit these exhibits, 6-A and 6-B, but not as substantive evidence of pollution of the creek.

Mr. Emery: That's understood, Your Honor.

Q. (By Mr. Emery): Mr. Sprow, in your understanding, are there other studies and reports subsequently excluding exhibits, Michigan exhibits — the two that have dealt with the problems in the LeBlanc Drain, the pollution problems, since the early 70's?

A. Yes, there have been.

Q. Now, are you aware of any recent studies that have been conducted with respect to the water quality situation in the north branch of Ecorse Creek as pertains to the LeBlanc Drain discharges?

A. Yes.

* * *

(94) * * * Q. Would you describe with respect to both dry weather flows and wet weather flows what happens at that point?

A. The LeBlanc Drain flows from Taylor across to Allen Park, across Lincoln Park, until it reaches what is called a junction chamber. It is a concrete chamber where the flow from the LeBlanc Drain can go in either of two directions.

The dry weather flows, which occurs during dry weather conditions, flows through a 42-inch pipe at the Wayne County Department of Public Works River Drive Interceptor.

Q. Before you proceed, let me — I am marking as Exhibit, Michigan Exhibit Number 7 a one-page document which is a diagram, and I ask you if that diagram represents the junction chambers that you have testified to?

A. Yes.

Q. And have you reviewed that document to see that it agrees with your observations of the junction chamber?

A. Yes. It is somewhat more of a schematic. I have compared it with my observations of the chamber and with the as-built plans. And it is a good portrayal of the junction chamber.

We have more detailed plans, but it is — this sketch is conceptually accurate.

* * *

(96) *Direct Examination (Continued)*

By Mr. Emery:

Q. Now, Mr. Sprow, you were testifying with respect to both dry weather flows and wet weather flows. What happens to the flows once they reach the junction chamber?

A. Well, the LeBlanc drain at that location consists of two barrels. Each barrel is about 9 feet wide by 8 and a half feet deep.

The LeBlanc Drain can carry five, 600, 700 CFS flows, which is much more than can be carried by a single 42-inch pipe. So, when the flows exceed the capacity of the 42-inch pipe, they build up until they reach an elevation where the flow — the sewage in the Le Blanc Drain is in an elevation somewhat slightly greater than the Ecorse Creek. At that point in time the overflow would occur, the overflow being the diluted sewage.

Q. The 42-inch pipe that you referred to, is that shown on the exhibit?

A. Yes.

Q. Would you indicate to the Court and Counsel where that 42-inch pipe is?

A. The 42-inch pipe is shown by a break line on the left diagram. The diagram is labeled "Junction Chamber, LeBlanc Drain."

There is a picture, a pipe with the (97) numerals "42-inch, single inch." There is then a break line and an arrow going down into the River Driver interceptor, another break line and then another numeral "42-inch simple outlet," into a regulator chamber which ultimately outlets into a 60-inch diameter interceptor known as the River Drive Interceptor, which conveys the dry weather flow to the Wayne County DDW Wastewater Treatment Plant in the City of Wayandotte at the corner of Wyandotte and Central Avenue.

The Court: Is that diagram accurate in that it predicts an overflow at 579 feet?

The Witness: That overflow elevation is going to vary somewhat. That is intended to be the elevation in Ecorse Creek. Water always seeks its own level. So, the overflow will not occur until the sewer builds up to a higher elevation than the creek.

The Court: How often per year does that occur?

The Witness: I would say 30 to 50 times a year. The facility plan and our evaluations indicate that if there is about four inches of rainfall, an overflow is very likely to occur.

The Court: Well, that's predicting. I want to know actually how often does it occur. Do you keep records on how often the LeBlanc Drain overflows?

* * *

(112) A. That was correct, four inches of rain would cause overflow. I intended to say .4 of an inch. .4 of an inch on the average, would cause an overflow.

The Court: I would like to just ask a question there. It wasn't completely clear to me this morning as we

saw the LeBlanc Drain and the — the gate area that the drain was in an overflow situation. Was it to you?

The Witness: The chamber which I believe you were referring to is a chamber that contains two large 8′ × 8′ flap gates. The purpose of those flap gates is to prevent leakage of the Ecorse Creek through the outflow portion of the LeBlanc Drain from entering into the River Drive Interceptor.

Those flap gates are on the LeBlanc Drain. Those are intended to seal during dry weather periods and to prevent discharge of river water into the sanitary sewer system which is — which conveys sewage to the Wyandotte Treatment plant.

Q. (By Mr. Emery): Could you tell those from your observations this morning, whether there was a discharge or movement of water through the LeBlanc Drain into the north branch of the Ecorse Creek?

A. The flap gates appeared to be sealed.

* * *

(159) A. Basically, the water quality standards say that all waters in the State of Michigan shall, as a minimum meet designated uses for industrial water supply, partial body contact, recreation, navigation.

Q. Mr. Sprow, is it not true that the water quality objective for the Ecorse Creek is partial body contact?

A. In a sense.

Q. Is that the water quality objective or it is not?

A. Yes; that is the water quality objective, a minimum objective for all streams.

Q. Do any of the alternatives in this final facility plan achieve that objective?

A. The alternatives in the Element 2 Report that you held up would not, in our general judgment, achieve the

low-enough fecal coliform levels to consistently comply with the designated use for partial body contact.

Q. Mr. Sprow, in short, none of these objectives would achieve the water quality objective of the program?

A. That is correct, and that report so states.

Q. Mr. Sprow, with regard to the Element 2 portion of this overall basin project, can you indicate, in general terms at least, what the overall construction costs are? There are 13 contracts, are there not, within Element 2?

A. Yes. I don't recall the numbers.

* * *

(168) A. You mean in terms of my review of the reports in the last couple of years?

Q. Yes.

A. Yes.

Q. And did you take into account the functioning of those gates in formulating your opinion and your reviews of the various reports of the engineers?

A. Yes. I recognized that the function of the gates was to keep the Ecorse Creek from flowing backwards up into the LeBlanc Drain.

Q. Now, it is not true that aside from conditions which you described as possible malfunctions of the system, that any combined sewer overflow discharge into Ecorse Creek would come through those gates from the LeBlanc Drain?

A. I think I said there was a possibility that it could back up into the combined sewer system and find its way into the Ecorse Creek through some other route. But I did indicate that the predominant method that the LeBlanc Drain would be discharged would be through those gates.

Q. Mr. Sprow, can you indicate to the Court what opens those gates or what keeps them from opening?

A. The gates are open when the elevation, the water level in the upstream LeBlanc Drain is higher than the elevation of the Ecorse Creek.

Q. In other words, it's a simple difference of hydrostatic (169) pressure?

A. Yes.

Q. In other words, the opening or nonopening of the gates would depend on the levels of every drain and the creek; is that correct?

A. Yes.

Q. Two variables?

A. Under most conditions, the level of the LeBlanc Drain is lower than the level of Ecorse Creek, and the gates would be closed.

Q. Mr. Sprow, my question was: the functioning of those gates is a functioning of the two variables, the water level inside the drain and the water level in the creek; isn't that correct?

A. Yes.

Q. Now, wouldn't it also be true that at times of low water levels in the creek, it would take less water in the drain to open the gates?

A. That is correct.

Q. Now, in your studies, have you made measurements of the water levels in the creek at any given times?

A. I did not consult any records of measurements of the level of Ecorse Creek.

Q. Are there any records that you know of?

A. I am not aware of any.

* * *

(173) * * * A. The holding capacity of the drain is a function of what the river level is. The higher the river level, the greater the storage capacity could be.

Q. So in other words, even assuming a one-foot drop in creek level, multiplied by the cross-sectional area and extrapolated back over several miles, even one foot could result in a very drastic difference in holding capacity, could it not?

A. That is correct.

Q. Have you made any such calculations or measurements with regard to the level of the creek and its relationship to the holding capacity of the LeBlanc Drain?

A. Not with regard to variations in elevation of the creek.

Q. All right.

A. For one elevation there was a calculation made.

Q. Yet that variable in creek level would have a marked impact upon the holding capacity of the drain?

A. It would in an increase in the creek level, would increase the holding capacity.

Q. And is it not also true that flowing from that at a lower creek level, the holding capacity of that drain may be greatly reduced below its overall holding capacity?

A. I hesitate to say "greatly," because I don't know what the variation would be.

* * *

(175) Q. About my far-less-than capacity. Let me see if I can help you. The lower the creek level, the more the storage capacity of the LeBlanc Drain?

A. Correct.

Q. Now, during the period of these studies, during alleged discharges from the LeBlanc Drain, you say there were no measurements made of creek level. Were there measurements made of levels within the drain?

A. I am saying there was at least one measurement of creek level, but I am saying during the whole two, three

years' facility planning process, I don't think there was a record kept day to day, week to week, of what creek levels were.

Q. Even though that was one of the key variables as to what will pen [*sic*] the gates or not because of the discharge?

A. The exhibit passed out showing the regulator has an elevation in there which is the creek level when that drawing was prepared.

Q. Now, during any of these potential discharges or alleged discharges, to your knowledge were there measurements made of any of the amount of flow coming through those gates?

A. During an overflow period?

Q. Yes.

A. There was, I know, some estimates. There was flow data (176) reported in the Facility Planning document. What basis was used to make that determination I am not sure.

Q. You are familiar with flow meters and other means of measuring flow, are you not?

A. Right.

Q. You are familiar with metering systems that would allow one to meter height or drop of height or many other factors?

A. Yes. There is some restriction in the flow stream. Yes.

Q. Would it be possible to actually measure the conditions under which those gates opened and the amount that would be discharged under any of those different conditions?

A. It would be theoretically possible.

Q. Has any effort been made to do that?

A. I am not sure.

Q. You don't know of any?

A. Correct.

Q. Mr. Sprow, I am referring to Exhibit 7, which is the schematic of the diversion regulator chamber.

A. Yes.

Q. The diversion and regulator chamber. So, what you indicated a moment ago in your testimony is where the schematic shows water elevation can cause overflow, that is based on an assumption at that date of a certain creek level; is that correct?

A. I think it was based upon more than an assumption.

* * *

(179) Q. Now, that board serves what function?

A. It is a spacer to insure that that regulator is always open regardless of how high the level is in the River Driver interceptor.

Q. Can the regulator still open more than the amount allowed by the board or has that now, in essence, become a fixed regulator?

A. The board was not seated. In other words, the regulator was open more than it would have if the board would have been holding it open.

Q. This is based on your personal inspection this morning?

A. Yes.

Q. You examined the regulator?

A. Yes.

Q. Now, the flow then would continue through this diversion or regulator chamber, through the regulating device into the actual River Drive interceptor; is that correct?

A. Under dry weather conditions, yes.

Q. Well, let's say under normal flow conditions.

A. Okay.

Q. The River Driver interceptor is a 60-inch interceptor?

A. Yes.

Q. And that flows to the Wyandotte Wastewater Treatment Plant; is that correct?

A. Yes.

* * *

(185) The Court: Where else could it go?

Mr. Feiler: It could back up through the regulator chamber.

The Court: You mean that because of some malfunction in the River Drive interceptor —

Mr. Feiler: Because of a board stuck in a float valve.

The Court: All right. That the level in the LeBlanc Drain could be forced to rise and therefore, there could be a discharge into the Ecorse Creek occasioned by some malperformance of the River Drive interceptor?

Mr. Feiler: And the Wyandotte Wastewater Treatment Plant. Yes.

The Court: Are you prepared to show that?

Mr. Feiler: We are prepared to show —

The Court: Listen to me carefully because I am not interested in exploring the will-o'-the wisp here.

Are you prepared to show that's what happened, that the River Drive interceptor malfunctioned specifically or overflowed specifically and caused that? I am not interested in hypotheticals. Are you prepared to show (186) this is what happened?

Mr. Feiler: No, Your Honor. We are prepared to show that Allen Park has a — we are hooked to the treatment plant facility.

The Court: Yes.

Mr. Feiler: We are further prepared to show that the entrance point of the River Drive interceptor and the Wyandotte Treatment Plant, that there is a valve —

The Court: Yes.

Mr. Feiler: — and that valve is regulated by someone at the plant, and there are no records of it; that the regulation of that valve controls the flow through the River Drive interceptor, and the deposition testimony was that by closing —

The Court: I have your point. Are you prepared to prove that because of the regulation of that valve in the interceptor to which you just made reference, that in fact, the LeBlanc Drain overflows and flows and causes pollution to discharge into Ecorse Creek?

Mr. Feiler: No, Your Honor.

The Court: Then what probative value does it have? All you are asking me to do is guess. I can't guess. I can't take this information and say, "Well, there is a possibility that if the regulator in the . . .

* * *

(188) The Court: Because that is inherent in the system. You are not being brought into court here today because that possibility occurs.

Mr. Feiler: We are brought into court because —

The Court: No, let me finish.

Mr. Feiler: I'm sorry, Your Honor.

The Court: I don't want to spend a good deal of time in this case listening to hypotheticals. I can only deal with reality here.

You are not being brought into court because you have violated the permit, allegedly because the regulator in the Wyandotte Treatment Plant shut or malfunctioned and that therefore, the level in the LeBlanc Drain increases or raises and causes an overflow. You are not being brought into court for that.

You are being brought into court because you have not cooperated in separating the storm sewers in Allen Park

and thereby you are in violation of a permit because the interim permission that is given to Allen Park contemplates that you are going to correct that by a certain date. That's what you are being asked to meet, and it is no defense to say, "Well, Judge, before you nail us on that, let me point out that maybe what is causing (189) discharge into Ecorse Creek is the possibility that there is a back-up from the River Drive interceptor." Unless you can prove that, I can't deal with it.

Mr. Feiler: I understand what Your Honor is saying very well, and I hope Your Honor will understand that —

The Court: Well, if you can't go any further than that, it has no relevancy. If you can prove to me that the real miscreant here is the back-up caused by the Wyandotte Treatment Plant and that's what is causing the sewage to flow into Ecorse Creek and not the claimed combined sewer discharge, of course I would hear you on that. It would be a complete failure of the purpose for which the entire project was conceived if the mischief here is being caused by that.

But that's not really anything you can prove. That's just a —

Mr. Feiler: That's correct, Your Honor.

The Court: A regular hearing being dragged across the trial.

Mr. Feiler: Well, Your Honor, I will say that in complete acknowledgement of what the Court is saying and justification of our efforts, is that we are being (190) asked in these proceedings to expend tremendous sums of money. It seemed to me relevant as to what basis for the conclusions had there been that these vast amounts of monies could or should have —

The Court: If you think that I have the power to second guess the final facility plan and public authorities

that have brought us all to this place, bring in your law. I will hear you on it.

I am proceeding at the present time on the basis that I have before me a permit that has been issued to a number of these municipalities, yourself included, which permits you to discharge pollutants into the Ecorse River for a limited period of time. And what is now being tried is that you will not be able to comply with the conditions of the permit, and that you are therefore in violation of it.

Now, if you want to meet the question head-on, you had better show me by what authority I can say: "EPA and DNR are all wet; that this Final Facilities Plan under which Lincoln Park and Taylor and the Wayne County Drain Commission have been proceeding to build separate sewers, that that is all wrong and that you, Federal Judge, can say that."

* * *

(192) But if that's what the law says, you had better bring it in, Mr. Feiler, because I am not proceeding on that basis, and I told you that in the pretrial conference the other day.

Mr. Feiler: The Court did indicate that we would be allowed to show that the Facilities Plan was arbitrary and should not be adopted by the Court, and that the Court would not listen to speculative alternatives.

However, if we had developed an alternative and were prepared to show that alternative to the Court, one that would be more reasonable, more cost-effective and accomplish the same objectives, that the Court would hear it.

The Court: I didn't say all of that.

Mr. Overman: Your Honor, may I interject here?

The Court: Yes.

Mr. Overman: The City of Allen Park has sued claiming that the plan is arbitrary and capricious. I don't believe that claim would be — is before the Court.

Mr. Feiler: We have cross-claimed.

Mr. Overman: You did not comply with NEPA by filing impact statements, and of course we object to the filing of that cross-claim.

* * *

(194) But there is no point in spending a lot of time on it here. I had better get to addressing that basic question.

Mr. Feiler: Your Honor, if that question is going to affect my ability to even cross-examine Mr. Sprow, then would it be possible or reasonable to ask the Court for a one-day continuance to do as much as we can on what is apparently a crucial threshold issue? I hate to have the whole rest of the conduct of this trial rest on what I can do this afternoon.

The Court: Well, that is not an unreasonable request. I can sympathize with you completely in that regard. It is a crucial question because it may mean, if I rule adversely to you on this, it may deprive you of any significant defense you have. Right?

Mr. Feiler: Possible.

The Court: Maybe you should take two days. Is anybody objecting to that?

Mr. Overman: I have no objection, Your Honor.

Mr. Emery: Your Honor, I have no objection to two days.

* * *

(204) * * * Mr. Anderson: Your Honor, I am Robert Anderson of the Region 5 from EPA. That's a 1975 PRM from our agency. So, it is a 1975 statement.

The Court: Thank you.

Mr. Anderson: Mr. Rhett does emphasize throughout it that it is done on a case-by-case basis. And when this was approved in 1976, Allen Park and the other municipalities who were involved also approved it. So, I think that was the basis on which the agency went forward with it.

The Court: All right. Finally, concern that I have is the reality of the fact that under this final facilities plan — I think it is known as Element 2 — the testimony so far has indicated that in Lincoln Park the work is almost completed, and that is true also in Taylor.

* * *

(210) Mr. Feiler: A May 28, 1976 memorandum from George Hamper of Region 5. I think he is the Grants Administrator, to file indicating many management techniques, different assessment criteria, combining, I suggest, to construct six to 14 projective alternatives from — management alternatives —

The Court: Wait a minute. Those are just words and they are falling over here without any impact on me. Is that a document that goes to a determination against separate sewers?

Mr. Feiler: Yes, Your Honor, price alternatives.

The Court: Read the document to me so I can get a feel of what your argument is from that document, where argument is made against separation of sewers, for whatever reason, the alternative that is promulgated there.

Mr. Feiler: It discusses, Your Honor — I can only go by the memorandum — address all management alternatives. Reach point of discharge — and it has: management alternatives, source controls, retention, detention, enforced controls, erosion, et cetera,

neighborhood sanitation, sewer separation, infiltration, deduction, * * *

(221) at that point, and the six comments we received were not environmental issues. And the separation would yield far more benefit of the environment than the destruction of the streets in Allen Park, and that was not raised at that time.

Your Honor, as you have pointed out repeatedly, we have had several approvals by resolution since that time, and in 1977 we started the construction phase, which in the agency is the third step, and they are all integrated steps, and it is untimely to raise the problem of negative declaration at this time, Your Honor.

The Court: Well, you said there were other documents that you had, Mr. Feiler. What are they?

Mr. Feiler: There were several memoranda, Your Honor, that perhaps, if I could take just a moment — I hadn't sorted these through to respond to that particular question.

The Court: Surely.

Mr. Feiler: Your Honor, the documents that I am now looking through are the compendium of documents obtained from EPA in Chicago that deal with several different approaches and different alternative to the Ecorse Creek situation.

I am somewhat at a loss to respond to the Court's question in a pointed manner. I am looking for one document in particular that —

(244) The Court: And hoped they would forget about you?

Mr. Kruse: I don't know if we hoped they would forget about us, but we thought there would have been a revising of the plan. We thought it would be addressed, the reduction of the BOD levels that Mr. Trimm, I think submitted to EPA.

The Court: You see, the real problem that I am facing and the reason that I am probing into this thing is this: that it would appear to me, Mr. Feiler, that even though I adopted your contention on the law, that I had the power to determine whether or not the action of the regulatory agency here was reasonable; whether or not they complied with the law, at the end I don't know that you would be able to prove any case that would come within your construction of the law.

Even if I accept your definition — Now, you realize if you were to take the approach that Judge Joiner took and limited any proof that you could offer touching upon whatever arbitrary or capricious aspect to whatever there was that the agency did, that would be a much more narrow question than if I permitted you to present any information, any proof that the action of the regulatory (245) agency was unreasonable.

And as Judge Harvey seemed to suggest, the test in that highway case he decided, even if you were allowed to take the best hold that you can take as I have been poking into this thing with your help, at the end I don't know that you would have any evidence to show this. And I am not talking about 20/20 hindsight now. I am not talking about bringing people in to say: "Well, if we had thought about this then, maybe we would have thought about it differently than we do now."

But I am talking about the hard evidence that indicates that in some substantive fashion or procedural fashion, the rights of Allen Park or its citizens was [*sic*] denied in the way in which the regulatory agency handled this project.

It seems to me that you would have a difficult time. But what I would like to do is have you make a statement on this record, if you will, as to what your offer of proof would consist in. And for that purpose, I think I should give you some time to get that together. Why don't we take a recess for about a half hour?

Mr. Feiler: Thank you.

(Recess)

The Court: Mr. Feiler, would you like to make your offer of proof?

(246) Mr. Feiler: Your Honor, I apologize in advance if some of these proposals are a little imprecisely formulated at this time. I will, first of all, propose to show that the requisite cost-effective analysis that was done for the selected alternative was based upon estimations of costs that have now been shown to be grossly underestimated; and that the real and genuine anticipated costs are so far in excess of originally estimated costs as to render the cost effectiveness curve analysis arbitrary and meaningless at this point.

The Court: Can you say more specifically about that, in view of the fact, as I understand it, that the figures will show that Allen Park's local share will not excess $11 million, approximately?

What are you talking to when you say that the cost of this project as far as your client is concerned will be in excess of that? What proof do you have to show that?

Mr. Feiler: Well, we know what the bids came in at as compared to what the estimated costs were. I don't believe there is any basis on the record at this point to

even determine what the particular share will be to the City of Allen Park. That is to say, the bids in excess of estimates, as I understand the process, have to go (247) through a grant amendment procedure and it may become the subject of apportionment between the different communities.

The Court: What I want when I ask you to make me an offer of proof, is to tell me what your proof will be as to these costs. You can't simply say that they will be higher without telling me what your proofs will be. We know that the bids in this case are, in your view, higher than they should have been.

Mr. Feiler: Yes.

The Court: Now, are you saying if they are done over again they will be higher than that? Is that what you are saying?

Mr. Feiler: I am saying, Your Honor —

The Court: Or lower than that?

Mr. Feiler: I don't know the specific answer to that.

The Court: You see, I want to know if I permit you to put in proof in support of your theory, I want to know what that proof is. The time for argument is not now. The time now is to tell me that if your witnesses take the stand, they will testify to a certain line of proof. I want to know what that is.

Mr. Feiler: Your Honor, we will put in proof to show that the cost-effectiveness curve used in the analysis to date is inaccurate for two basic reasons —

(248) The Court: Don't give me the reasons, give me the proof. What will your costs be; what will you show it to be? What will the numbers be?

Mr. Feiler: Your Honor, as far as I know, it has not been determined.

The Court: How can you prove anything if you put your witnesses on the stand and either you or I ask them the question and they say, "I don't know? How do you prove what you are contending?

Mr. Feiler: Because, Your Honor, the cost-effectiveness curve was not based upon costs to Allen Park. It was based upon project costs.

The Court: Just give me the numbers that will prove your observation as to that result. What is it that the witnesses will testify to from which a conclusion can be drawn that the requisite cost analysis or the requisite cost-effectiveness analysis was not done well?

Mr. Feiler: That, number one, the analysis was based upon an estimated construction and related cost of approximately $22 million.

The Court: What do you say that your proof will show that that estimated cost analysis will be?

Mr. Feiler: Somewhere in excess of 44 or $45 million.

The Court: If that is so, then I have (249) just lost my sanity. What are you objecting?

If they are going to come in with figures that are substantially higher, do you believe what these contractors are willing to do — why are you advocating that this be done — unless I misunderstand your point —

Mr. Feiler: Your Honor, I feel a little bit in something of a bind. My point in making this offer is to show the kind of testimony that we will produce dealing with these different matters that are contained in the analysis to date.

I frankly, your Honor don't feel qualified to stand here and tell the Court what our experts will ultimately testify to.

The Court: That's what I am asking you to do because I want to know, if you are permitted to cross-examine

Plaintiff's witness and to put on your own witnesses, I want to know what the proof is likely to be.

Is there some proof that supports the theory that you have been advocating here for some time? Now, if I just heard you correctly, you are saying that your poof will show that the estimates of the cost of this storm sewer separation will be much higher than those that the regulatory agencies —

Mr. Feiler: No, no. I'm sorry. I (250) misspoke and —

The Court: That's the way I heard you say it.

Mr. Feiler: I'm sorry, Your Honor.

The Court: Maybe I misunderstood it.

Mr. Feiler: My point was that the estimates for project costs of which the cost-effective analysis were done, utilized a cost of approximately $22 million.

The Court: Was that high or low?

Mr. Feiler: That was way under what the actual costs will be, based upon bids received on these contracts.

That is, the analysis of the cost-effectiveness curve is palpably arbitrary because of the gross underestimation of the costs in those analyses.

The Court: Go ahead.

Mr. Feiler: Further, that the cost-effectiveness curve is arbitrary because it does not rationally compare the different alternatives to —

The Court: You are giving me argument. Tell me what your witnesses will say, not in terms of conclusions, but upon what will they base their testimony?

Mr. Feiler: They will base the testimony that the cost-effectiveness curve is arbitrary (251) because the alternatives chosen do not achieve similar water quality standards.

The Court: What will the testimony be as to the water quality standard?

Mr. Feiler: None of the alternatives will achieve water quality standard.

The Court: None?

Mr. Feiler: None.

The Court: All right.

Mr. Feiler: In fact, Your Honor has already heard that testimony, in part.

The Court: None of the alternatives, including the separation of the storm and sanitary sewers will achieve water quality standards?

Mr. Feiler: That's correct, Your Honor.

The Court: That's one thing.

Mr. Feiler: We will further show that the impact assessment was not properly done by reason of the fact that the majority of the construction of this whole project takes place within the municipal confines of the City of Allen Park, nor in the assessment is the impact related to the City of Allen Park except in a general-wide way.

And that, under Council's environmental quality guidelines and the tests applied to NEPA, under NEPA, that assessment should have examined the site specific (252) impacts.

The Court: You can't make an argument without the necessity of putting in any proofs, unless your proof is that most of the work is going to happen in Allen Park.

Mr. Feiler: Of what the impacts are in Allen Park.

The Court: What will your proofs be as to the impacts in Allen Park?

Mr. Feiler: That the construction details will involve open trenching, tunneling, construction of manholes, all within very close proximity to existing residential and commercial structures; that the residential neighborhoods of the City of Allen Park, in many cases are older structures; that the effect of vibration and structural damage through excavation activity is severe and

never addressed; further, there are instances in Contracts 1, 2, 3 and 4 of tunneling taking place in narrow right of way, in close proximity to the rear of garages and residential structures; further, that the contract contemplates construction of manholes which require large excavations, in some instances which are only a few feet from basement substructures.

And the contract specifications at least allow an alternative. I think it is called sheeting, which (253) involves the driving of piles or barrier materials; and that these difficulties have never been examined within any environmental assessment or appraisal.

We will also put on proofs to show that the contracts in this case represent a rather unusual situation, of contractors having to secure their own construction easements. These construction easements involve — I think if I say hundreds of individual properties, would not be an overstatement, that these contractors, in order to obtain these construction easements, will have to do so either through negotiations or ultimately through some means of condemnation which is property not set forth in the contract.

The Court: What will your proof be that they can't do it?

Mr. Feiler: That the potential through construction delays, through the requisite negotiations, perhaps of hundreds of individuals, is just a tremendous factor in potential delay of this project.

The Court: I can't understand that without having to take proof on it. This is a tough problem. What proof do you have that it is tough to do?

Mr. Feiler: Difficult and highly unusual.

(254) The Court: I suppose Plaintiffs would stipulate to that.

All right, go ahead.

Mr. Feiler: We will show that in Contracts 1 thru 4, the degree of implementability of these contracts has never been properly addressed.

The Court: What does that mean?

Mr. Feiler: That the contracts as drawn and specified, cannot be built within existing rights of way of the existing combined sewer.

We will further show that the environmental assessment, where it is asked to describe future commitment of resources or allocation of resources, was totally remiss in failing to advise members of the public that there is presently under consideration an Element 3 study which will be contemplated to take place in the western part of this basin for the treatment of storm water in order to help achieve the water quality standard for Ecorse Creek.

The Court: What will your testimony be in that regard?

Mr. Feiler: As to the nature and extent of Element 3 as presently conceived, and of course, (255) the Court can take notice that it is not mentioned in the environmental assessment.

The Court: You are going to have somebody to come in here and show that there is a study?

Mr. Feiler: What it contemplates at the present time and why it is being done. We will further show, Your Honor, that that environmental assessment has, in a sense, put the cart before the horse, in indicating an inability of secondary treatment for the combined effluent of the City of Allen Park whereas only now is there a study underway to evaluate the Wyandotte Wastewater Treatment plant; and that at least the assessment should have discussed what the Wyandotte Wastewater Treatment plant did so that those reviewing the assessment —

The Court: Is that an argument or is that proof?

Mr. Feiler: There will be proof.

The Court: What is the proof? That the Wyandotte Treatment plant can take all present sewers?

Mr. Feiler: No, Your Honor, that question is presently under study.

The Court: Maybe it is. I suppose Plaintiffs will stipulate to that.

Mr. Feiler: Then we would want to bring (256) in testimony as to the nature of the study that is being conducted; that the environmental assessment addresses essentially four alternatives. The assessment fails to deal with an alternative known as the best management practices, which is in fact, the subject of an in-house EPA memorandum; the assessment fails to deal with alternatives that may be local to the City of Allen Park that would have the opportunity to achieve the same levels of water quality and pollution abatement; and further, the assessment fails to discuss why previous alternatives in the planning process were discarded — that is to say, up until approximately 1974.

The Court: What would your proof be in that regard; what would your witnesses say? These sound like arguments to me.

Mr. Feiler: We have indicated in our pretrial statement that we will be bringing in a gentleman from the Environmental Protection Agency to discuss the consideration —

The Court: What will he say; what will be his testimony?

Mr. Feiler: Well, since he is, in effect, an adverse party, I hate to commit —

The Court: I want to know in advance what you are attempting to prove so that I can evaluate where this takes you in the event that you do show it.

(257) What will this gentleman say?

Mr. Feiler: That there is a — an alternative method for pollution abatement known as best management practice.

The Court: That what method is that an alternative method?

Mr. Feiler: It is a method that incorporates several procedures.

The Court: What is it, tell me. Don't keep it from me. If he is going to tell me the day after tomorrow, I would like to know now, what is the method?

Mr. Feiler: The method is the first flush of combined drain; some retention; disconnecting downspouts; in-line chlorination; introducing polymers into the large system to increase fluidity.

The Court: If that is done, will he testify that there will be no discharge into the north branch of Ecorse?

Mr. Feiler: I doubt it very much.

The Court: Why are we dealing with it?

Mr. Feiler: What we are dealing with is that the environmental assessment —

The Court: No. You are evading my point. If this is an alternative method, it is only good as (258) an alternative method, it is not, Mr. Feiler, if it does not discharge combined sewage into Ecorse Creek? And if he cannot testify that that's what this will do, what good is his testimony?

Mr. Feiler: If the issue is pollution in Ecorse Creek —

The Court: What are you saying, I should make a judgment if I should allow you to do this, that if pollution in Ecorse Creek is somewhat reduced, then maybe that's okay, not that it is entirely reduced, but that it is somewhat reduced?

Mr. Feiler: No, Your Honor. Your Honor, none of the alternatives totally eliminate it.

The Court: We do know this: if you have separate sewers and you are only discharging storm water into Ecorse Creek, that you are not putting wastewater into Ecorse Creek.

Now, the question is: what is in the storm water, in the runoff? I grant you, you may not yet meet water quality standards, but that may be a fact of life with which we are going to have to live, at least in our generation.

I don't know. It seems that we might not be able to do everything, but all right. I have that (259) point. What next?

Mr. Feiler: That in the environmental assessment, the EPA did not reveal that they were relying primarily on the conclusions reached by the engineers who prepared the facilities plan itself.

The Court: What will your testimony be in that regard?

Mr. Feiler: The fact that Mr. Hammer so indicated, and I have actually put that in my brief, and that the environmental assessment does not disclose it.

The Court: That Mr. Happer [*sic*] indicated what?

Mr. Feiler: That the environmental assessment was based primarily on the environmental assessment prepared by the consulting engineers for the project.

The Court: And not on what?

Mr. Feiler: Not on a true agency, independent hard look as was required by the act.

The Court: In other words, the consultant decided this, the EPA did not?

Mr. Feiler: That EPA reviewed it and relied primarily on the conclusions of the consultant; that the environmental assessment fails to consider a no-action alternative for the City of Allen Park alone.

The Court: That's argument, isn't it? (260) There won't be proof of that? You are going to have to have me conclude that from —

(260) Mr. Feiler: Well, if the Court could take notice that the environmental assessment does not include that, that would eliminate the need for proof of that.

The Court: But your point is that there was no consideration here of doing anything at all?

Mr. Feiler: With regard particularly to the City of Allen Park.

The Court: All right.

Mr. Feiler: The next item has already come into testimony. Very honestly, I don't know what the status of it is. I would therefore, like to list it, Your Honor, so that the Court can indicate whether there is going to be a full exploration of these points. And that is, that there is a lack of knowledge as to the frequency with which these discharge gates have opened in the past. There has been no determination.

The Court: What will your testimony be in this regard or is this an argument?

Mr. Feiler: Well, it will be partly argument and party elaboration.

The Court: What testimony will there be?

Mr. Feiler: Simply that there has been (261) no determination.

The Court: Okay.

Mr. Feiler: That there has been no actual measurement of the flows, of the discharge amounts through the gates. Your Honor, the next item, I am not really certain at this point if I need to submit a separate offer of proof. I would rather play on the safe side and indicate it to the Court than be foreclosed later, but that is to show that the matter of discharge into the Ecorse Creek is not necessarily relevant to Michigan water

quality standards for the Ecorse Creek pursuant to the Michigan Administrative Code, which allows something called a mixing zone.

The Court: Well, I agree with you. That is an argument and I don't see that as an offer of proof.

Mr. Feiler: Okay.

The Court: Anything else?

Mr. Feiler: Yes. And that the data contained in the facilities plan with regard to BOD noting a removal as a result of this project is inaccurate.

The Court: What will your proof be in that with regard to what the accurate data is?

Mr. Feiler: That the difference of BOD (262) loading on the Ecorse Creek Allen Park no action alternative will be minimal.

The Court: What will that be?

Mr. Feiler: I don't know the number, Your Honor.

The Court: What will your witness say?

Mr. Feiler: Your Honor, I don't know the exact number in a scientific, definitive sense.

The Court: You don't have a witness lined up to testify to that?

Mr. Feiler: We do, Your Honor.

The Court: And do I understand that the witness will testify that the data contained in the facilities plan is inaccurate because it fails — strike "fails" — because it overstates characteristics of the discharge water into Ecorse Creek?

Mr. Feiler: It incorrectly states — I don't know if it is overstating or understating — but it incorrectly states the BOD loading characteristics from the storm water discharge, the combined discharge, and the result that would be accomplished through this project.

The Court: In other words, it doesn't pollute; is that right? Is that the conclusion of that witness' statement,

if I accept it, and that is, that her testimony will be that this excess water that is discharged (263) into Ecorse Creek does not pollute the creek?

Mr. Feiler: No, sir. I don't believe that that will be that witness' testimony.

The Court: What will it say: it does pollute it but not as much as what the facilities [*sic*] statement was?

Mr. Feiler: Yes; that is what I believe that witness's conclusion will be. We have discussed this testimony with the witness. It gives his opinion that the BOD characteristics are inaccurately represented.

The Court: Just BOD?

Mr. Feiler: That is all he indicated to me, Your Honor.

The Court: What does he say about other characteristics that have to be controller [*sic*] under the action?

Mr. Feiler: I have not discussed that with him in detail.

The Court: That would be important, wouldn't it?

Mr. Feiler: I think so, Your Honor.

The Court: All right.

Mr. Feiler: That would conclude my offers at this time.

(264) The Court: Now, if I were to accept this proof, it would seem then that what I would have to do would be to send this back for a consideration by EPA of some or all of these factors with a view towards a revision of either the negative declaration or the issuance of an environmental impact statement.

Mr. Feiler: I believe so, Your Honor.

The Court: If that were sent back and they considered each of these elements and made their own statements and conclusions as to the significance, factually, of each of these assertions on the impact

statement, and came to the conclusion that the present project for separating these sewers was still the best alternative, that would end the matter, wouldn't it, in your view?

Mr. Feiler: That would end a —

The Court: Or would I then have to go back, in your view, and look at what they decided?

Mr. Feiler: I would agree with the Court, that if they follow proper procedures —

The Court: Which would be to consider these?

Mr. Feiler: — which would be to follow the requirements of NEPA Section 102.

The Court: And consider the factors and weigh them and issue a statement with regard to them one (265) way or the other?

Mr. Feiler: We believe an environmental impact statement is required.

The Court: Let's assume the best from your point. Assuming that an environmental impact statement is required, not a declaration, and they consider each one of the points that you raised, perhaps a dozen — and I don't know that all of them are in the posture of things to be considered — but let's assume that. They decide that still the final facilities plan Element 2 is the best way, that would end it, foreclosed, except the arbitrary and capricious standard —

Mr. Feiler: Your Honor, I don't know. If they took 5 and 5 and added up 11, I assume that would be arbitrary.

The Court: So really the whole thrust of what you are asking me to do is to determine now that this negative declaration is deficient procedurally and should be sent back in order for these factors to be considered?

Mr. Feiler: That's correct.

The Court: I have your point.

* * *

(272) The Court: Oh, yes. Is the question —

Mr. Friedman: And so I understand it, and I am not as educated on this as my colleagues were —

The Court: I understand that.

Mr. Friedman: — are full of due process considerations and safeguards, and each of these due process considerations and safeguards was abided by by the agency. And that the time for upsetting those agency decisions, if anyone chose to or wanted to, has long gone by. Therefore, it is like a case that has been decided by the Trial Court and an Appellate Court. It is over with. We have to learn how to deal with the rest of our lives, and that's why decisions have to be final.

The Court: I understand.

Mr. Friedman: And I submit to the Court that that's the way the case is here and we should proceed with the trial on the basis of the evidence.

The Court: You are saying at least from the vantage point that you have that you don't feel this should be undertaken by MDNR and EPA? What about if they did it while we were trying the case? Would it be delaying the case for two weeks so they can look at it? The case may be over with if they do it.

I am trying to find the shortest distance between the two parties.

(287) * * * Now, yesterday I spent, with your help, a good deal of time in having Mr. Feiler present in some detail an offer of proof. At one time in the proceedings I

speculated on whether or not, if the negative declaration was amended to state in more detail what the reasons are for the regulatory agency's actions, that this might in some way expedite this litigation, if not mooting it out.

Having thought more about that overnight, I will restrict myself simply to saying that if there is any desire on the part of MDNR, on a voluntary basis, to make an amendment to the negative declaration which, presumably it has the power to do, that's up to MDNR. But I am certainly not going to order it.

In making this ruling, I also reserve the right to supplement the points that I make in a final opinion in this case in which I detail findings of fact and conclusions of law.

Accordingly, my ruling is this: that I will limit cross examination of Plaintiffs by the Defendant Allen Park to the issues of the violation of the permit and the remedial relief claimed. In the process of proving its case, I assume that Plaintiffs will show that Ecorse Creek is polluted, and if Defendant Allen Park wishes to controvert (28) that claim by showing it is not polluted, I, of course will hear that. But other than that, the issue will be limited.

Specifically, I will not permit the Defendant Allen Park to inquire into any of the contentions raised in its offer of proof on cross-examination, which in substance claimed procedural deficiencies in (a) the failure on the part of MDNR and EPA to issue an environmental impact statement; and/or (b) a deficient negative declaration.

Now, my reasons for this ruling are as follows: first, I think whether it is determined, as one lawyer has said

this morning, either a matter of laches or estoppel, still what does appear in very sharp form here is that there is a significant matter of laches that I must be concerned with. During all of the adminstrative procedures in this case, during the years that this final facilities plan was under discussion and resolution, Allen Park did not raise any of the objections it seeks to raise here. Only after the project was implemented did Allen Park begin a lawsuit in the Wayne County Circuit Court which it then consented to dismiss without prejudice. So, laches is a very significant reason for my ruling.

Secondly, I must consider the prejudice to the other parties that Allen Park's belated statement of objections and sought for relief would produce.

* * *

(294) * * * Mr. Friedman: If the Court please. I would like to object to the motion of Counsel. Your Honor gave Counsel an opportunity yesterday to make a separate record, giving him the opportunity to make such a record without the necessity of bringing witnesses. Your Honor asked Mr. Feiler to tell you exactly what the witnesses would say, and you spent the whole morning giving him an opportunity to make a separate record, and I think it would unduly delay the proceedings further if he were permitted to make a second separate record.

Presumably, the second separate record wouldn't be any different than his original separate record.

The Court: Well, I distinguish between what Mr. Feiler is now asking and the procedure we had yesterday. Yesterday it was an offer of proof that he presented; today he is asking for an opportunity to present proof. I think that is the difference.

But my problem with your suggestion, Mr. Feiler, is that you then accomplish indirectly what I (295) have ruled you may not accomplish directly. One reason that I was interested in your offer of proof, and I took careful notes on it and studied the points again last night that you had made yesterday, is that I am convinced that that proof is not probative even if it is offered. And it seems to me that the point that Mr. Friedman makes that is persuasive is that the kind of separate record that you contemplate could run into some weeks of testimony — because each of these persons whom you have named not only would have to come here, and while that probably could be arranged in consecutive fashion, they would have to be examined and cross-examined and probably at great length. So that what you would in effect be doing is getting what I have already denied.

No. I think I am going to deny that motion. I am satisfied that if you seek review in the event that it is necessary for you to seek review, assuming that the decision of this Court would be adverse — and I certainly haven't reached that point yet — that the Court of Appeals would have before it, on the basis of your proof that you detailed yesterday, a pretty good idea of what it would be that your witnesses would say or would not be able to say. Your motion is denied.

* * *

(301) * * * The Court: Well, you believe your statement of belief is sufficient to make it relevant. In what way is it relevant?

Mr. Feiler: Relevant to the issue of — to the measurements which constitute pollution.

The Court: Is your contention that water quality standards for the Ecorse Creek permits some level of water quality because of the mixing zone concept?

Mr. Feiler: In part, Your Honor, yes.

The Court: I will let you proceed.

Mr. Feiler: Thank you. Your Honor, I am a little bit at a loss. During direct examination Mr. Sprow was questioned as to certain aspects of exhibits that were introduced on Exhibit 2. Am I now foreclosed from cross examining him as to those exhibits?

The Court: No, not if what your inquiry seeks to establish is further information or further testimony with regard to the issue in this case, the violation of the permit, et cetera. Do you have further questions in that area?

Mr. Feiler: I don't, Your Honor.

(302) The Court: I am not going to permit you to go into alternatives, if that's what you have in mind.

Mr. Feiler: I just would like to state that that was part of the direct testimony and I feel that I should have a right —

The Court: Well, but I am only going to view that part of the direct testimony that is offered as a statement of what was considered on the way towards the construction grant, the final facilities plan, Element 2.

You have a different purpose. Your purpose now would be, if I would permit it, is to draw out from this witness what, if this witness could testify to that, and let's assume he could — what the superior advantages of some alternative might be over the one that was finally adopted. That, I will not listen to if that's your purpose, you are right; I am not going to permit you to cross examine in that regard. Is that your purpose?

Mr. Feiler: My purpose, Your Honor, is to —

The Court: Well, all you can do is ask the question. If there is an objection I will rule on it. I can't deal in a vacuum with this. You know what my ruling is on

limiting you on cross-examination. If there is some gray area there in which you are not quite sure,* * *

(304) * * * And I felt I had to put that in so the permit requirements are clear. The other alternatives were rejected by the procedure, the administrative procedure. I think the other alternative —

The Court: Let me shorten this by saying that I will permit the answer to that question. I don't think Mr. Feiler has crossed the line yet. I did hear testimony on direct as to those alternatives, and he wants this witness to recite again what they are. I will permit that. But we are not going to go into the merits of the alternatives.

Q. (By Mr. Feiler): Mr. Sprow, by referencing the documents which you have previously identified, can you indicate to me — just identify each alternative that was considered in these various documents right up to the present time.

The Court: Incidentally, I suppose the best evidence rule would say that the documents contained this and that therefore, you could get out of the documents whatever you wanted since it is admitted into evidence.

If you are relying on the document, wouldn't the best evidence be what the document itself says?

* * *

(359) * * * Q. (By Mr. Feiler): Mr. Woods, in response to an earlier question, did you indicate that you physically observed a discharge through the gates?

A. No, I did not.

Q. To your knowledge, has there ever been any metering or monitoring at any time of the gates from the LeBlanc Drain to the north branch of the Ecorse Creek?

A. No monitoring.

Q. No monitoring number of times opened?

A. No — I don't know.

Mr. Feiler: I have no further questions, Your Honor.

* * *

(378) * * * A. In relation to what?

Q. In relation to a storm, a significant storm.

A. I would say it is a fairly flashy stream in that it can rise rapidly and falls quite rapidly.

Q. Mr. Woods, are you familiar with any tests using radioisotopes or similar measures?

A. In the stream?

Q. No, just in general.

A. Yes.

Q. Could you describe what kind of tests you would be familiar with using such devices?

A. I believe devices have been used to compute time of passage, reaeration coefficients for the stream — the rate at which oxygen is put back into a body of water, transfers in and out of a body of water.

Q. Are you familiar with the use of radioactive isotope testing to test, trace sources of water coming into a receiving stream?

A. No.

* * *

(388) * * * more and more optimistic about the performance of that plant, based on the data that is now coming in, and the disappointing thing will probably be, that even though the Detroit Waste Water Plant may be in complete compliance with the effluent limitations provided for in the regulations, the receiving waters downstream — and I am not talking about what comes out of the Wyandotte Treatment Plant — I am talking about the runoffs from the land and the small creeks into the Detroit River and into Lake Erie — are probably

putting more phosphorus into that lake now than the waste water plant is putting in.

So that there can be a situation, unhappily, of less than adequate water quality but not due to organic waste or waste water but due to other conditions. And now we are being exposed to the horrible prediction of chemical pollution and acid rain and the like.

Mr. Emery: I think the Court has hit the nub of one of the problems that is faced under the Act. You have point sources such as the Detroit plant, and hopefully, it will get to meet the requirements. Then you have non point sources such as storm water overflows. The concept is that the point sources such as the LeBlanc drain, the Detroit sewage treatment plant outfall are controllable sources because something is happening that you can correct it. Some of the non point sources are not as easily or readily controlled, (389) and that certainly is a point that is brought out in this case, where even when all the point sources on the north branch of the Ecorse Creek are corrected, with the human sewage going in, and there is still going to be storm water problems to be dealt with.

Whether that would be dealt with in the same way, I guess we don't know at this point.

So, I think the Court has hit on one of the problems. The key for my client as an enforcement agency is we go after the control of the source of the pollution. That's what the source of our endeavor is in this case.

The Court: Your next witness.

Mr. Emery: Mr. Steve Miller, Your Honor.

The Court: Your full name, please?

The Witness: Steve Andrew Miller.

STEVE ANDREW MILLER, a witness for and in behalf of the State of Michgan having been duly sworn by the Court, was examined and testified upon his oath as follows:

Direct Examination

By Mr. Emery:

Q. State your full name and staff position with the Department of Natural Resources, please?

A. I am Steve Miller. My position is chief of the hydrologic study unit, Water Management Department of Natural Resources.

* * *

(418) In other words, your last column is simply an extrapolation, that if this had happened, that's what the volume would be?

A. That's correct.

Q. But you actually don't really mean to suggest that that was the volume?

A. Right.

Q. Did you in your studies make any determination of what the actual volume was?

A. No, we did not.

Q. Now, Mr. Miller, if you were asked to determine the actual amount of discharge through a series of gates such as on the LeBlanc drain, are there measurements that could be done to determine that?

A. The total volume —

Q. Yes.

A. — of that particular storm event? We would have monitors there the entire time of the storm, from

beginning to end, and would have gotten an estimate of volume, total volume in that manner.

Q. What kind of monitoring would that be? Would that be permanent placement of some monitoring device?

A. Well, that would be difficult in this situation. The best estimate that you would get would be to do the type of measurement that we had done here, only to do them — (419) Mr. Friedenberg — only to do them continuously. We made two sets, two measurements. If you stay there from the time all the way through and measure the flow, you could get a pretty accurate representation of the flow.

Q. To your knowledge, has there been any determination, even under your opinion, of a bypass or discharge of any quantity that may actually have been bypassed or discharged?

A. Not to my knowledge.

Q. Now, Mr. Miller, I am not sure I understand you. I now you did not do the measurements, but did you testify that you were at the site on April 4th during the event during which these measurements were made?

A. I was not there. I believe it was April 3rd — let me check — I was there the evening before the storm would have been started around — well, it was raining when I was there but the LeBlanc had not started to overflow yet.

Q. Did you make any actual observations as to whether the bypass gates were open or closed at any given time?

A. No, I did not.

Q. Would it be possible to make such a determination? That is, could some device have been used to make sure the gates were open or closed?

A. I would believe so, yes.

Q. Now, is it true, therefore, that the assumption or conclusion which you have drawn, that there was a bypass occurring, was (420) based on — was it based on any visual observations on your part?

A. No, not visual observations.

Q. So, you are simply — you are not testifying, therefore, that in your opinion, you observed a bypass or discharge?

A. That's correct.

Q. Mr. Miller, you indicated earlier that the origin of the north branch of the Ecorse Creek occurred out by Metropolitan Airport, did you not?

A. Yes.

Q. Is that, in fact, the south branch of the Ecorse Creek that originates at the airport?

A. Well, the south branch originates at the airport; the north branch, perhaps not directly in the airport but to the north of it is the general origin.

Q. During the event which is the subject of Exhibit 20 on April 3rd and 4th, to your knowledge, was there any measurement of Ecorse Creek levels during that event?

A. There was observations of the level of the north branch of Ecorse recorded as part of notes, the vehicle notes.

There was also in evaluating the field notes for the flow measurement at the outlet of the LeBlanc drain, the depth of flow during the two sets of measurements that were made.

In review of those, there was only a (421) slight drop in the -- a slight decrease in the depth of the water at the location. So, that was an indirect measure of the level of Ecorse.

Q. Can you indicate where on those notes that level was indicated?

A. Is your question regarding the north branch or the LeBlanc drain?

A. The north branch.

A. Yes. It is on the front of these.

Q. By "these," you are referring to what I have had an opportunity to review as the discharge measurement notes?

A. Yes.

Q. Prepared by the people in the field?

A. That's correct.

Q. Now, can you indicate where the creek level is shown?

A. The creek level itself is shown relative to the time that we were there first at 11:10 on the 3rd, which indicated we measured from — Mr. Friedenberg — from a mark that Mr. Friedenberg and I had placed on the bridge, and I indicated a depth on that mark from the bridge to the water was 9.2 feet.

Q. Which bridge?

A. Southfield Road.

Q. And what does that indicate to you in real terms of relative creek evaluation?

(422) A. That in itself doesn't tell you — tells us very little except distance from that mark to the water.

What we use it for is, we measure or monitor that at the end of the measurement, in this case at 12:30 a.m., and that readily was 9.4 feet, indicating a two-tenths of a foot differential during that measurement.

We again measured that at 6:15 a.m. — Mr. Friedenberg — at 6:15 and 6:45. So, in that entire time you had — at these points in time, the level was .25 feet difference at this location.

Q. During which period of time is that?

A. From 11:30 p.m. on the 3rd to 6:15 a.m. on April 4th.

Q. Now, in making your evaluation, did you determine if the levels on that date were above average, below average or comparable with any other known creek levels?

A. No, I did not for comparison.

Q. Are you able to determine where the creek level was, let's say in relation to the top of the tube at 001?

A. Not directly, no.

* * *

(436) * * * The Court: I see nothing inconsistent in that with my ruling, and it doesn't open the door to a determination by me of the merits of the decision that was reached.

I have concluded that I cannot second guess the results of this work. My limited purpose is to determine whether or not the Federal Water Act was being violated here through the procedure of the permit, and the course of conduct that the regulatory agency and the communities engaged in in remedying what plaintiffs contend is a situation of pollution.

Mr. Emery: Your Honor, in fairness, I should indicate that there is data in the 1974 facilities plan with respect to pollution, and it is my intention, because that data was prepared by Mr. Trimm, with respect to the issue of pollution, to elicit testimony from Mr. Trimm as to those pollution incidents which they studied.

The Court: Well, Mr. Feiler is free to cross-examine on that.

Mr. Emery: Certainly, certainly.

The Court: Have I made my ruling clear, Mr. Feiler?

* * *

(450) * * * Q. What is your understanding of what occurs to dry weather flows of combined sewage once it passes through the River Drive interceptor?

A. It goes to the Wyandotte Treatment Plant for secondary treatment.

Q. Are you familiar with what occurs with the regulation chamber during wet weather flows?

The Court: Isn't this all kind of repetitious?

Mr. Emery: Yes, Your Honor. I was going to move forward.

Q. (By Mr. Emery) And Exhibits 9, 10 and 11, do they contain data with respect to combined sewer overflows from the normal LeBlanc drain into the north branch of Ecorse Creek?

A. Yes, they do.

Q. And for purposes of the record, does that information commence (451) on approximately — or on Page 7-46 of —

The Court: Does it, Mr. Emery?

Mr. Emery: Yes, it does, Your Honor.

The Court: Okay, so the answer is, yes. Let's move on. You can point out all of this to me in argument if you want to.

A. Wet weather flows start on Page 795.

The Court: Thank you.

Q. (By Mr. Emery) On Page 7 — 51, there is a chart and I would like you, Mr. Trimm, to explain what that chart represents?

The Court: Do you have an extra copy of it?

Mr. Feiler: Your Honor, again, just so the ground rules are clear, if Mr. Emery is going to question Mr. Trimm with regard to the contents of these exhibits, then

I would like it to be understood that I would have a right to cross-examine.

The Court: On the material that he goes into.

Mr. Feiler: I don't see why it should be Mr. Emery's choice.

The Court: It isn't Mr. Emery's choice. I am trying to get him not to do it, but he is doing it anyway.

(452) Mr. Feiler: Then I must insist on the right of cross-examination if he proceeds into it.

The Court: Not into the area which I ruled yesterday is an area I am not going into.

If he goes into some area here on showing pollution or its results as it affects the creek, of course, you can go into that. But I don't want to go into the merit of the alternatives.

The decision by the agency was the one time, was and has been made, and I am not going to allow you to go into that for the reasons that I stated earlier.

Mr. Emery: Your Honor, nothing that I would cover would do other than point out the data that was collected.

The Court: Why do you have to point it out? It is in evidence.

Mr. Trimm, as skilled as he is, can only point to the page and you can tell me that, too.

Mr. Emery: All right, Your Honor.

The Court: Are you going to ask him to explain some of the data in the exhibits?

Mr. Emery: One of the graphs or charts on the exhibit at least.

The Court: You want him to explain it?

Mr. Emery: I just wanted him to explain (453) that the first time I looked at it, it wasn't real apparent what it was.

The Witness: That chart is a chart from a recorder that was set in a manhole on the LeBlanc drain at Capitol and Elliott, which is just upstream from the regulator of the LeBlanc drain.

The intent of the recorder — we had two recorders, one further upstream — was to determine what was happening in the LeBlanc drain during the study period.

The Court: When was that?

The Witness: Basically November and October of 1973.

The Court: What was happening, according to this?

The Witness: On this particular day there was an overflow. The regulator opened up. The tide gates opened up and the jagged part of the chart shows the effect and change of velocity in the LeBlanc drain itself as a result of the tide gate opening and the increase in velocity in the LeBlanc drain.

Q. (By Mr. Emery) Do the Exhibits Nos. 10 and 11 contain data with respect to other overflows?

A. Yes, it does.

* * *

(465) * * * Q. I take it from your testimony that no alternative site has yet been determined?

A. We have four sites that we have identified in our report. We have recommended the most optimum of the sites, but at this pint there has been no progress beyond that, as far as I know.

Q. Where are these sites? Are they in Allen Park?

A. The sites that were actually reviewed are in the City of Lincoln Park.

Q. Has there been any concurrence by Lincoln Park officials?

A. As far as I know, no.

Q. Do you know personally the nature of the objections from Lincoln Park with regard to the location of the contract 13 retention basin?

A. I only know what I heard. I am not sure if that is the real objection. I know what I heard.

Q. Were those objections you heard at these public hearings that you described in your direct testimony?

A. No, sir. At the public hearings, the objections were not raised.

* * *

(518) * * * Q. That was in Taylor?

A. It was in Taylor. It was a sanitary basin, again. However, the timing was such that by the time the contractor was ready to proceed, the Drain Commissioner Charles M. Youngblood, had managed to obtain that land so the contracts could proceed.

Q. Do they have so called quick take condemnation rights?

A. Yes, as far as I know.

Q. And based on your judgment as an engineer in terms of abatement of pollution in Ecorse Creek, do you have an opinion as to whether or not contracts one through five should be awarded and contract thirteen should be proceeded upon?

A. Yes, I do.

Q. What is your opinion?

A. My opinion is the project cannot operate appropriately without those projects or those contracts being awarded and built. It is essential to the program.

Mr. Friedman: Thank you. I have no other questions.

The Court: Let's take a few minutes recess at this time.

(Recess)

* * *

(546) Q. Now, did you use those observations in formulating opinions and proposals at that point and time?

A. Yes, we did.

Q. During the event of October 28th, 1973, which I think your testimony — you indicated represented a significant discharge —

A. Yes.

Q. Into the Ecorse Creek?

A. Yes.

Q. Does that chart show the water level within the LeBlanc Drain itself?

A. It shows a relative water level, yes.

Q. Relative between what and what?

A. We set a meter in there to record elevations and it was very close to the bottom. So, it is relatively — relative to the depth of the water in the LeBlanc Drain.

Q. In other words, you actually measured the depth of the water in the drain?

A. We did that as part of the seting up the meter and confirming at the end to make sure that the meter had not been jarred or something mechanically had gone wrong with it to give a different reading, so that we knew we were recording appropriate levels.

Q. Mr. Trim, the chart on Page Seven — Fifty-One showed indications of water levels within the drain; is that correct?

(547) A. That's right.

Q. And at the point where you indicated a discharge, what was the water level within the drain, can you tell us?

A. The water level was approximately seven point six feet deep at that point when the discharge started.

Q. And what is the size of the drain at that point?

A. There is a sketch in there showing it, but it is about nine feet deep. In fact, the sketch also shows how the meter was installed at that point.

Q. What is the page identification for that sketch?

A. Just a moment until I find it. It is shown on Page 7-27.

Q. And looking at that sketch, does that confirm your recollection that the drain is nine feet?

A. Well, it is a very odd-shaped drain. There is one point where you could measure nine and a half feet. If you will look at the sketch, you will see it is almost impossible to describe verbally. It is best to look at the sketch.

Mr. Feiler: What I think might be helpful, Your Honor, if it would assist the Court, I would like Mr. Trim to make a — just a little schematic representation on the blackboard of the sketch in this exhibit.

The Witness: I am not as good a draftsman as I am an engineer.

* * *

(549) * this has a manhole opening in it and the other structure did not. The shape of the size as depicted here is approximately nine and a half feet high at the deep end and five feet nine at the other end. It is more egg-shaped, and it is approximately nine feet wide.

Q. Now, Mr. Trim b8 you can resume the stand.

Were you able to conclude from your measurement at the point where you registered a discharge on that date,

the relative utilized holding capacity of the LeBlanc Drain?

A. At that point and time we didn't attempt to compute the relative holding capacity. All of our computation is that we would use the entire holding capacity. There was no attempt at that point to determine how much was unused. The mathematical model that we used, we assumed all would be used.

Q. What would, in your judgment lead to a discharge prior to full high utilization of the storage capacity of a drain?

A. The relative elevation outside — downstream from the tide gates controls the amount of storage that would be available.

Q. The tide gates are the gates that we have been referring to that would allow, if opened, a discharge from the LeBlanc Drain through outfall tubes into the Ecorse Creek?

A. That's correct.

Q. That's what you are referring to as tide gates?

(550) Q. Can you tell me, Mr. Trim, who owns those gates?

A. As far as I know, they are under — either constructed as part of the Drain Commissioner's project — but there is some interrelationship between the DPW and the Drain Commissioner that I am not familiar with.

Q. Did you, as part of your study, make an investigation as to the sealing mechanism or the operational functions of these gates?

A. We had people in the actual structure because we had meters installed in the lake. We did not get into any detailed study of the sealing nature of the system. At that point in our study, that was not the problem. We were facing a different problem other than whether that gate was sealed properly.

Q. Now, these gates are in some sort of a concrete structure, are they not?

A. That's right.

Q. Some sort of chamber?

A. That's right.

Q. Do you know who owned or maintains that chamber?

A. As I understand it, it is owned by the Drain Commissioner, although there is some involvement by the DPW because it materially affects the operation of the Wyandotte Treatment Plant if there is a malfunction.

* * *

(552) Q. I thought you just indicated that under those conditions the regulator would be closed down?

A. No. I said except for the minimum eight inches, the eight inches would still be opened. That's what I said.

Q. Were you able to make any determination on that date as to the flow from the junction chamber through the regulator into the river drive interceptor?

A. We knew from the recordings we had on the river drive interceptor that there were flows coming out of the LeBlanc going into the river drive interceptor. They were substantial. In fact, they were using a large volume of the river drive interceptor as a hydraulic radiant along — we have a series of meters along the river drive interceptor, so that there was a substantial grading downstream from the LeBlanc Drain, but it was flat upstream which indicated a large amount of water was coming in at the LeBlanc Drain.

Q. With regard to the need for any of these meterings or measurements, either the interceptor, the junction chamber, the drain or the gates, did you or your firm conduct any further measurements or tests of this nature since 1973?

A. Of — you mean that seme type of thing in that area?

Q. Yes.

A. No.

* * *

(555) * * * The Court: Well, I suppose in cross-examining that is always a function, but I think I can then say that if you wish to attack his credibility, you have to contain the cross-examination to that which was raised on direct. That was not gone into on direct examination, was it?

Mr. Feiler: Your Honor, I will tell you what was brought into. The witness expressed an opinion that there was a mathematical computation on —

The Court: Let me ask it of you this way: What is it that you want, apart from any attack that you might make on Mr. Trim's credibility, what is it that you want to elicit from him in this line of inquiry? What do you hope to prove or obtain ?

Mr. Feiler: That after reviewing the water quality studies, after doing the other tests that were done, after making the only measurements that were made, and after doing all of this review, his opinion was to enclose the north branch of the Ecorse Creek.

* * *

(565) The Court: I cannot second guess the agency's decision in that regard.

I agree that if there was evidence in this case to show that this thing was completely unfounded, was not supported by any evidence whatever, was, as I say, a fraud, then I suppose that I could say maybe this was arbitrary and capricious and it never should have been attempted.

What I am concerned with more as I listen to the testimony today, is something that I didn't envisage when I got into the trial of this case. And that is that there are certain conditions that have now been put into effect that are irreversible; that unless this project is completed, those conditions are going to cause injury or damage not only to the people of Allen Park but also to the People of Lincoln Park and Taylor.

Mr. Feiler: We would seriously doubt that, Your Honor.

The Court: I say I am concerned because that was his testimony.

It seems to me you have got to come to grips with that.

Well, let's recess now. It's ten minutes of one and there is a lot of work still to do.

We will be in recess until nine o'clock.

* * *

(573) The Court: I take it you are going to ask him some questions about the map?

Mr. Feiler: Yes, I am.

Q. (By Mr. Feiler) Mr. Trim, you were asked to review the bids for what reasons?

A. To determine that the bids as received and the prices as received at that time were appropriate at the time to make a recommendation whether they should be an award based on our evaluation.

Q. Was the purpose of your review due to the fact that the bids received were substantially higher than estimated costs?

A. Yes, that's true.

Q. And in preparing your review, you prepared the document which I believe has been introduced as Allen Park Exhibit 21?

A. That's correct.

Q. Perhaps you can refer to that.

A. Yes. Thank you.

Q. Mr. Trim, without going into each instance in this report, can you indicate where on this map some of these specific construction problems occurred — and I want to preface that with a question, Mr. Trim, just so the record is clear — I take it these construction maps on details are not part of the facilities plan; is that correct?

* * *

(575) A. No, sir. We did not recommend rejecting contract thirteen. We reviewed contract thirteen. Now, following that the contractor, as we understood it, refused to extend his bid. So, there is no contract or available on contract thirteen. We do have a site problem, but as I understood it, our review was not because — was not just because of the site problem. It was also because we don't have a contractor to build that contract at this point.

Q. Mr. Trim, will you indicate on this map — are you familiar with the areas of the city in which these construction details are represented?

A. Generally, yes.

Q. Can you indicate to the Court the kind of areas generally involved in these contracts?

A. They are basically residential areas. There is some construction in commercial areas, but it is basically residential.

Q. Would you be able to indicate on the map, in a general way, the commercial areas involved?

A. The commercial areas are typically along the major roads. There is commercial at Southfield Road; there are some spots on Pelham, but mostly residential. There are — there is some commercial on Allen Road, commercial

on Ecorse Road; there are spot commercials throughout the area, localized small shops.

(576) Q. The balance of the areas are generally residential?

A. Generally residential.

Q. In reviewing this matter over in your participation to whatever extent in formulating these plans, did you review the character of the residential areas?

A. We did not formulate these plans.

Q. I understand that. In your review of these plans in preparation of Exhibit 21 —

A. Oh, all right.

Q. — did you make any analysis of the character of these neighrhoods?

A. Not myself personally.

Q. Are you familiar with the character of these neighborhoods?

A. Yes.

Q. Would you characterize them as older established residential neighborhoods?

A. Yes, I would.

Q. And did you formulate any opinion or do you have any knowledge to the age of most of the homes in the areas where this construction is to take place?

A. To my knowledge, most of the homes are at least twenty years old or better. So, they are basically older residential areas.

Q. Is it true to say that Allen Park is a fairly totally built (577) up urban community?

A. That's correct.

Q. Now, in your analysis, I believe you pointed out that to certain construction difficulties due to the tightness of the working area.

A. That's true.

Q. Can you indicate to the Court some of those kinds of areas and what the problem was that you perceived and wrote about?

A. I can just take one of the typicals out of the report and point on the map where it applies and give you some background as to what the problems are.

Q. Fine. That would be helpful.

A. On Page 24 of this exhibit there is an example of a construction in an easement, and it is over on Laramie Street and Philamine Street.

As we go in over Laramie, it is in this general area here. And there are proposed constructions in Philamine Boulevard and also easements on both sides.

We took an example of the easement — an example of easement going to the west on the north side of Philamine. And there is a picture, a photograph number 88 on that page. It shows that the proposed construction is proposed twelve inch sewers which is to be fifteen and a half feet deep in this alley.

The twenty-four inch existing sewer is (578) thirteen and a half feet, which is the existing combined sewer that is in the alley. So, it is slightly deeper.

There are some tight construction conditions getting through the area which includes a — there is a garage and home on each side of the actual alley. There is a fence that actually goes right down the alley, and there is some trees on the side of about four to six inches in that area that will have to be replaced after construction.

In that area — I would have to look at the detail — I don't have the profile — but as I recall that area was either open cut or tunnel option, and in our opinion it would require a tunnel to protect both the home and the garage, which means that the restoration problem would be involved because of tunnel techniques would actually eliminate a lot of the restoration problem, and if the

tunnel techniques are probably carried out, there would be no damage to either one of the buildings.

And one of the provisions in the contract to ensure that is to have a preconstruction survey of each home to identify any existing — before the construction starts. So, there should be very little question afterwards if there is any additonal damage, that the contractor be responsible for repairs, which is a provision of the contract.

(579) Q. What kind of damage?

A. If the tunnel is not properly built, there could be settlement of the area and could cause some damage to the garage or homes.

The Court: Are all of the costs involved in that kind of detailed planning involved in the bids?

The Witness: Yes, they are. Now, in addition, however, there is one additional problem that has to be faced — and this is a good example of the problem. There is some existing homes connected to the combined sewer. They will have to be rehooked up after the system is entirely built and tested, taken off the combined system and put into the now sanitary system, which means so that there will have to be some type of construction to go down, straight down, find the old connection and reconnect it to the new connection. It can be done by open cut or caisson. The caisson would be a smaller construction area and require less disturbing of the adjacent area. But it would require that the contractor acquire the permission from the homeowners to come in and do it. Again, that is provided in the contract, to get the permission to go in and make that construction, but they are difficult.

Q. It is factual that contractors have the obligation to obtain (580) all the necessary permits and easements to do that?

A. Yes, it is in the contractor's requirements. This is typical of all of the ones we evaluated. I can go through more, but — would you like me to go through more?

Q. I would like you to go through other instances where construction will take place in confined alleyways.

A. Yes, they are.

Quite a few of them are documented.

The Court: If they are already documented in the exhibits — are they?

The Witness: Yes, they are.

The Court: And that is what exhibit?

The Witness: Exhibit 21.

The Court: Would you then, in answering Mr. Feiler, simply be referring to what is in the exhibit?

The Witness: Yes.

The Court: It is already before me. You can use it in argument or any other post testimonial way, but it is not necessary for him to tell me what I can find in there.

Q. (By Mr. Feiler) Mr. Trim, is it true that these are only instances of problems within the city?

A. Yes, typical instances that we do give in the report itself, the percentage of the job that is involved in this type of problem.

(581) Q. Does that report detail the areas involved with the contracts on an overall basis?

A. It involves where we consider there would be construction problems and why we — to explain where our estimates were at, the costs they were. And we used — and what we did is found that the major construction problems were within the tight easement. We identified the percentage of tight easements in each contract, then we went into the typical examples of that problem and put them into reports.

Q. The report does not attempt to delineate all the areas where these problems occur?

A. No, just gives typicals.

Mr. Feiler: Your Honor, if the Court will indulge me, I would like him to —

The Court: No. I will not indulge you. We are not going to chase every rat down a rathole. You have typical problems. Can you give me the reason you want him to delineate every other problem that is not referenced in — what is the number of the exhibit, Mr. Trim?

The Witness: Number 21.

The Court: Why do you want that, every other problem? What is the purpose? I am acquainted now with the fact that there are a number of problems as detailed in that exhibit, and he has begun to testify.

Tell me the purpose now for this record (582) and for your wanting me to be fully informed as to every problem? I am sure there are many, but why do you want me to be informed as to all of them?

Mr. Feiler: I wasn't asking the witness to go through each, property by property.

The Court: What do you want him to do?

Mr. Feiler: Generally —

The Court: Mr. Feiler, he has indicated to you that the construction difficulties in this project where they impact on his estimates are contained in Exhibit 21; is that correct, Mr. Trim?

The Witness: That's correct.

The Court: He has said that while there are other problems, presumably in his opinion, they are not of a sufficient magnitude to impact on the estimate. Is that correct?

The Witness: To increase the estimate.

The Court: Yes, to increase the estimate. That's where he is right now. What additional do you want to know?

Mr. Feiler: I wanted to have an opportunity to demonstrate to the Court the extent within the city on the proposed contracts —

* * *

(590) * * * Q. From the alley tunneling, are there other situations—

The Court: Not detailed in Exhibit 21?

A. Well, there would be occasions where in going down the road and the like, where there would be other substructures in the way, other chambers where the contractor, if the structure was too close, to protect these structures at the tunnel. There is also some tunneling required at some road crossings and the like. So, there are areas where there are difficulties that could cause special construction.

And the option is given to brace rather than tunnel to protect adjacent structures.

Q. In the plans that you have reviewed, are there any other open trenches other than in road right of ways?

The Court: Open trenches during construction?

Mr. Feiler: Yes, Your Honor.

A. Yes.

Q. (By Mr. Feiler) Where are those?

A. Some of the alleys are proposed as open construction, where there is sufficient room and some are given the option, where the engineers apparently made the decision not to determine which technique to use. So, they are shown as optionals. So, there is quite a bit of that in the contract, where there (591) is an option to the contractor to either open cut or tunnel.

Q. Now, I take it your analysis was based upon being able to do all this within the existing easements; is that correct?

A. The actual structures would have to be in permanent easements, but the contract requires that any additional right of way needed for construction, the contractor would have to obtain. We know that there would be additional right of way required for the construction. You can't put it in the existing easement. The construction can operate in the additional easements. So, there would be additional easements required, and that is a requirement of the contractor. The contractor gets the easements.

Q. How would the contractor go about getting the easements?

A. He would have to contact the individual property owner and negotiate right of entry.

Q. This is for permanent improvement, permanent right of way?

A. Not for permanent.

Q. Let me backtrack a second. Did you indicate that there would be some additional rights of way necessary for the construction of the facility itself?

A. The only major acquisition that I am aware of is the site or the retention basin, which is contract thirteen, which has to be purchased, which hasn't been at this point.

* * *

(593) The Witness: It was a decision between L.N. Hayden Company and the Wayne County Drain Commissioners' Office.

Q. (By Mr. Feiler) Was that part of any reference within the facility plan, that is, the contractors securing their own easements for construction?

A. The facility plan would have to be made and obtained.

Q. So, the determination that the contractors would have to provide them with something subsequent to the facility plan —

A. That's correct.

Q. — have you made any determination — I think you can resume the stand.

The Court: Before you leave the area, Mr. Trim, let me ask this question.

Your testimony, of course, is that this map that we are looking at, which is Exhibit 25, was not part of the final facility plan Element 2. But were the problems generally, as far as tunneling, tight construction, the need to have open ditches in some places, were these generally known to Mr. Benker; do you know?

The Witness: We discussed them during the process and the difficulties. Mr. Benker does work in the City of Allen Park — for a long period of time. We worked in the city of Taylor.

* * *

(604) * * * Q. How did you become aware of them?

A. We received a copy of them from the Drain Commissioner's Office after we were hired.

Q. A copy of the letter?

A. Yes.

(Defendant Allen Park Exhibit 26 marked for identification.)

Q. (By Mr. Feiler) Mr. Trim, I am going to show you a copy of a letter dated February 15, 1980, signed by Charles N. Youngblood, signed by Mr. Benker, which has been identified as Defendant's Proposed Exhibit 26, and ask you if you can identify that document?

The Court: Is that the letter?

A. Yes, but I believe there is something missing. I want to make sure. There are some attachments that

were part of the letter I received that aren't attached to them there.

Q. (By Mr. Feiler) Do you have the actual document that you received with the attachments in your possession?

A. I believe it is in the office. I don't have it here.

Q. From whom in the Drain Commission did you obtain this letter?

A. It came as part of the package that was picked up at his (605) office. We sent a courier down to pick it up. I can't tell you who prepared it. I got a call saying it was ready to be picked up, and it was picked up as part of the package.

Q. This was part of the information that you were provided pursuant to your contract to evaluate these bids?

A. That's correct. We asked for information and that was part of it.

The Court: Subject to obtaining whatever the attachments are that Mr. Trim received, is there any objection to Defendant's Exhibit 26?

Mr. Downs: I would like to take a look at it.

The Court; You haven't seen it before?

Mr. Feiler: They were all discussed at the depositon.

The Court: That's what you should use the afternoon for, in preparation for the next day. Is there any objection?

Mr. Downs: Your Honor, I have problems in terms of the relevancy of this letter. If the purpose of using this is to go behind and challenge the reasonableness of whether the bids as originally estimated or in the proper number or whether the bids as actually came in, I would question whether or not this is relevant to this proceeding. I am not quite sure how this can be used.

(606) The Court: Let's ask Mr. Feiler. What is your purpose in offering it, Mr. Feiler?

Mr. Feiler: I believe Mr. Trim was asked on direct examination with regard to his opinion as to bids one through five. It is part of the prayer for relief in the complaint of the contractor and the complaint of the individual Plaintiffs.

The Court: What do you want me to do with it if I admit it? What's your purpose in having me look at it? Does it show some opposition to the guides of the bids or what?

Mr. Feiler: Yes, it does, Your Honor.

Mr. Downs: Your Honor, if I could comment on that. I think the prayer for relief means that we are asking for the facility plan as created and normally implemented through the administrative processes being put into force and effect. This is one segment of the entire state and EPA administrative process, that the plan be constructed and then bid out, and after the administrative agency process, the applications, the work goes forward. I am wondering if we are kind of back-dooring a partial challenge to the full scope on the facility plan.

(607) The Court: Let me read the letter a moment. This is one of those peculiarities again, where you read the exhibit in order to determine whether or not to admit it.

Let me, in order to determine whether or not this should be admitted — and at the time that this letter was written and Mr. Benker is the author of it — he is with L.N. Hayden, Inc., Engineers, right?

Mr. Feiler: Correct.

The Court: For whom was L.N. Hayden working? Who were they representing here in this letter?

Mr. Feiler: Your Honor, I don't know if they were representing either —

The Court: Well, they must have been representing somebody. Who were they employed by? Does anyone know?

Mr. Feiler: They were apparently asked to render —

The Court: No, not what they were asked to do, who did they represent when they brought this letter; do you know, Mr. Trim?

The Witness: I am not sure who requested that letter.

The Court: No. I am having trouble today.

(608) Who did L.N. Hayden, Inc., work for? Who were they retained by at the time this letter was written?

The Witness: From my knowledge, they were still working for the Drain Commissioner, but they were also working for the City of Allen Park.

The Court: I didn't ask you — please, who asked for the letter? I only asked by whom were they employed. Do you know, Mr. Kruse?

Mr. Kruse: The were still under contract for the Drain Commissioner. It is obvious for the record, but it is my own understanding that that letter was requested by the Drain Commissioner's Office.

The Court: Well, it might have been requested. I don't know why you folks continue to insist on telling me where it was sent. All I am trying to find out is who L.N. Hayden was working for or with or on behalf of when this letter was written. Now, it was written to the Drain Commissioner. Obviously, the Drain Commissioner does not have to ask somebody to write in a letter if he already knows what the subject matter is. But when Mr. Benker wrote this letter to Mr. Youngblood, on whose behalf did he write this letter? Does anyone know?

Mr. Kruse: My belief is that he wrote (609) the letter on behalf of his contract with the Drain Commissioner, Your Honor.

Mr. Tiplady: My understanding is that there was no request by the Drain Commissioner.

The Court: There was a request?

Mr. Tiplady: There was no request by the Drain Commissioner for him to offer that letter. I believe it was in his capacity as representing Allen Park.

The Court: Can you tell me whether or not when he wrote this letter he was representing Allen Park?

Mr. Feiler: I have been the official city attorney —

The Court: When he wrote this letter — a simple question — and you are Allen Park's lawyer — was he or was he not representing Allen Park in writing this letter?

Mr. Feiler: In writing this letter it was my understanding that that was done pursuant to his contract with the Drain Commissioner.

The Court: I didn't ask you that. You are evading me. He wrote this letter for some reason. In the letter, by its terms, he is suggesting that certain of the contracts be rebid, right?

(610) Mr. Feiler: Yes, Your Honor.

The Court: On whose behalf was he suggesting that, to the Wayne County Drain Commissioner? He writes the letter to the Drain Commissioner saying some of the contracts should be rebid. On whose behalf was he doing that? I have to know in order to determine admissibility.

Mr. Feiler: Your Honor, I cannot respond to Mr. Benker's mental —

The Court: I am not asking about mental. Was he doing this for the City of Allen Park? You are its attorney. You should know. He either was or he wasn't.

Mr. Feiler: Your Honor, I don't know.

The Court: You don't know on whose behalf he was writing this letter?

Mr. Feiler: It was my understanding that that letter was written to the Drain Commissioner because Mr.

Benker, under contract to the Drain Commission, was familiar with the project and was responding to the bid.

The Court: Let me ask it another way — and I am only asking this because this is a bench trial and I assume as an officer of this court if you have this proof you will present it.

Is it intended to show that at or about the time that this letter was written, that it was the (611) position of Allen Park that these contracts should be rebid?

Mr. Feiler: It is the intent of this letter to show that at the time it was written it was the position of the Drain Commissioner's own engineers that they should rebid.

The Court: But not Allen Park?

Mr. Feiler: Well, Allen Park certainly concurs.

The Court: That's what I want to know. Allen Park concurred at the time?

Mr. Feiler: Certainly, Your Hono..

The Court: Let me ask you a curious thing about this. It gets more and more bizzare all the time.

This suit was started in December. Mr. Kruse filed an appearance on behalf of the City of Allen Park on, according to our records, on January 3, 1980.

Now, you seek to introduce a letter which is a month and a half later in which apparently Allen Park is concurring in this project provided the bids — provided these bids are reopened and rebid.

Mr. Feiler: I didn't mean to suggest that, Your Honor.

The Court: Isn't that what it says? (612) That's what the letter say. That's why I wanted to read the letter. The letter says: "If we go ahead and rebid —" Well, let's look at this. The bottom paragraph on Page 1. What kind of conclusion can any person reading this get other than what it says?

"At the time the bids were opened for this project on June 27th, 1978, in our opinion, the bidding atmosphere was not as favorable to the owner's as it is presently. We anticipate today more contractors will bid on this project, and in turn we should receive more competitive and favorable bids due to the decline of construction work and the increased unemployment in the construction industry as compared to June, 1978. Therefore, we would recommend the bidding contracts one through four."

The top of Page 2: "We recommend awarding contracts five to Rocco Perrera and Company due to the bidding between 2.7 percent of the revised estimate contingent on the following —" and then there are four paragraphs.

"Furthermore, we recommend a grant amendment be sought and approved prior to the awarding of any contract for the increased construction costs, redesign and revision costs and construction engineering costs."

Now, here's someone representing the (613) contract be proceeded with on certain terms and conditions.

Mr. Feiler: Contract five, Your Honor.

The Court: And that one through four should be rebid so that the combined facilities plan, Element No. 2, can be proceeded with, right? Yes or no?

Mr. Feiler: Certainly it was his opinion that one through four should be rebid because they were too high.

The Court: So that that particular project could be proceeded with — and by "that particular project," I mean Element 2, right?

Mr. Feiler: The "we" in that letter —

The Court: I am not asking you about the "we" right now. You have already told me that Allen Park concurred in this.

Mr. Feiler: Your Honor, just so the record is clear —

The Court: No, no — just a minute. I am wondering now whether or not this Court is being used. Here, well

after this suit was started, I am favored with an offer of a letter by you in which a project engineer working, you say for the Drain Commissioner but — writes a letter which Allen Park concurs in and in which it is recommended that if the contracts are rebid, this project can proceed.

(614) Now, if I admit this letter I can draw the conclusion, can I not, that that's Allen Park's position?

Mr. Feiler: I don't believe so, Your Honor.

The Court: Why not? That's what the letter says.

Mr. Feiler: The letter indicates —

The Court: Since you offered it, I will admit Defendant's Exhibit 26. But I am telling you — unless you want to withdraw it now — that's what the implications are.

Mr. Feiler: I think we can clarify that by subsequent testimony.

The Court: You want to offer this?

Mr. Feiler: I do, Your Honor.

The Court: It is admitted. Now, having admitted it, I want to know what that does to your lawsuit, the defense of your lawsuit? Doesn't it mean that Allen Park is saying as of February 15 — because you say they concurred in this —

Mr. Feiler: Pardon me, Your Honor —

The Court: That — just a minute — this is serious business, Mr. Feiler.

Mr. Feiler: I understand that.

(615) The Court: I think maybe there is some suggestion here now that this Court is being used for whatever reason to delay this project. Here is an open admission that Allen Park is willing to have this plan proceed notwithstanding all of the balderdash here about open trenches and tunneling and easement problems and the burden on this community, and the arbitrary

decision-making of a regulatory agency or their own unreasonability or all of that other proof that you made the the other day. Here you put in a letter that shows only a few weeks ago they were willing to go ahead with this project if the bids were rebid. Do you know what the implications of that are?

Mr. Feiler: Your Honor, that would certainly not be our position with regard to that letter.

The Court: Why did you offer it?

Mr. Feiler: Because there was direct testimony as to a recommendation for acceptance of bids and its reliance by Mr. Trim at different times on the expertise of Mr. Benker with regard to construction details.

The Court: How can you say that this project is arbitrary and capricious, is unreasonable, that it should be overturned, when only a few weeks ago your client (616) is concurring in a letter which was written saying the only objections we have to this whole thing is the size of the bids. Now, is that the only objection Allen Park has to this, is the size of the bids.

Mr. Feiler: No, Your Honor, but may I —

The Court: Well, that's what the letter says.

Mr. Feiler: Your Honor, that was the letter of Mr. Benker.

The Court: Written with your own statement, the concurrence of Allen Park.

Mr. Feiler: That bids were too high.

The Court: And that the project could proceed if it was rebid. He even says "We recommend a grant amendment be sought and approved prior to the awarding of any contract." What does that mean other than what it says? Benker is saying: "Let's go ahead with this deal if we can get a better price."

And you are here defending on the basis that you have advanced. The word "bizzare" is the best word that I can think of — maybe there are stronger words —

* * *

(618) Benker simply says: "Rebid one through four and award number five to Rocco Ferro (sp) and we are all set." That's what this says — "and by the way, see if you can get a little extra money out of EPA for the awarding of any contract for increased construction costs, redesign and revision of costs and construction engineering costs while you are at it."

I just don't know what you are doing here, Mr. Feiler, with this kind of a position. Let's take a recess.

(Recess)

The Court: Please proceed.

Q. (By Mr. Feiler) Mr. Trimm, you in your direct examination indicated that the relationship of the contracts thirteen retention basin to the proposed improvements on contracts one through four; do you recall that?

A. Yes.

Q. I think it would be helpful, Mr. Trimm, if you wouldn't mind, if you could perhaps demonstrate the slows or the overall schematic, hydraulics, of the system and the relationship of that contract thirteen retention basin.

A. Yes. Do you want me to come up there and do it?

Q. Please. I think it would be most helpful.

* * *

(630) * * * Q. Can you tell me in your judgment what would happen with these contracts if contract thirteen, let's say, is not completed within the foreseeable future, say, within the next five years or seven years or some such period?

A. The system couldn't be put in use.

Q. It could be?

A. It could not be.

Q. Could not be. And who would be paying for it in the meantime? I mean, I assume the system would have to be paid for even though it couldn't be used.

A. As I testified earlier, a project of this level, there would be a series of communities paying for it, but ninety percent would come from Allen Park.

Q. You are saying if contract thirteen was not completed within a period of time, Allen Park would be in a position to have to pay for the improvements but they would not be in a position to use it?

A. That's correct.

The Court: I am not able to follow that. Of course, we are dealing in ninety percent of twenty percent, aren't we?

The Witness: That's correct.

* * *

(645) Mr. Downs: Your Honor, Plaintiff's Proposed Exhibit 27 is a summary of the bond financing figures prepared by Mr. Moon, and will be introduced through Mr. Moon. I will be questioning Mr. Trimm in regard to the second page of the exhibit, which is a line item of cost breakdown of the bond component.

The Court: Do you have any objection to that document?

Mr. Feiler: Your Honor, I have no objection as to questioning this witness in regard to this proposed exhibit.

The Court: Thank you.

Q. (By Mr. Downs) Mr. Trimm, have you had an opportunity to examine the second page of this Proposed Exhibit 27?

A. Yes, I have.

Q. And have you had an opportunity to examine Line No. 1, identified as construction costs?

A. Yes, I have.

Q. What is the figure that is represented there?

A. The figure is $45,479,198.

Q. And what does that figure represent, from your knowledge?

A. That represents the total of Contracts 1 through 5 as bid, and Contract 13 as estimated by our office.

Q. What was the number that your office estimated for Contract 13?

* * *

(655) * * * Q. (By Mr. Downs) Mr. Trimm, Item 6, "Architectural Engineering Inspection." Could you please indicate what that refers to?

A. That's the actual engineering work that is done during construction to insure that construction is going according to plans and specifications.

Q. And that figure is what, sir?

A. $2,757,000.

Q. Item 7 is what, sir?

A. Item 7 is construction contingencies, which is an account used for unanticipated costs, $1,364,396.

Q. Mr. Trimm, is that $1,364,000 the only contingency money which is available to this project in the course of the project?

A. No, sir.

Q. Why is that?

A. There — there will be local funds on deposit of approximately $12 million, local funds on deposit. They

will be in, and those funds will enter the construction costs and supplement and increase the contingency account above the 3 percent shown on the sheet.

A. Mr. Trim, Items 8 through 14, do you have any personal knowledge as to those items, 8 through 14?

A. No, sir.

* * *

(657) Q. And assuming, and if you can recall, Mr. Trimm, you earlier testified that your estimate on the percentage that Allen Park would have to pay of the local share was, I think, 92.4076 percent; is that correct?

A. 96.4076[*sic*] that's correct.

Q. Yes. And assuming that the City of Allen Park does have to pick off 92.4076 percent of this $12 million bond issue, what, then, would that — what, then, would be Allen Park's size of the bond issue?

A. The maximum amount would be $11,090,000.

The Court: What did you multiply — correction 92.4 percent against?

The Witness: Just a second. Let me do that number again. .924076 times $12 million.

The Court: You went all through the explanation of telling me why Line 5 was too high, and now you are going again to $12 million.

Well, your testimony is it should be less than $500,000 —

The Witness: No. $500,000 is cost, but 80 percent is grant eligible that would be paid by the Federal government. It is only $100,000 less, and there's * * *

* * *

(665) * * * Q. In your opinion, are the homeowners protected against damage by virtue of the contractor's

ability to make repairs, the bonding company's obligation for the insurance coverage?

A. They are not protected against damage because damage would have to be corrected when it happens.

Q. Based on your experience in your business, are you to a more or less degree familiar with the contractors who were the low bidders on Contracts 1 through 5?

A. To different levels and degrees, yes, I am.

Q. Based on your experience, do you have an opinion as to the competency of these contractors to execute the work required in Contracts 1 through 13?

A. Our experience is that these contractors are qualified to do the work.

Q. The letter which has now been received as Exhibit 28 is an estimate by Mr. Binker, is it not?

A. That's correct.

Q. It is an estimate of the costs contained in what contract?

A. Contracts 1 through 5.

* * *

(678) Q. Now, you say that the numbers you used were estimates, numbers in the facility's plan itself?

A. Initially up until just before completion of the plan and submittal to the DNR for review, the original estimates that were used in the facility plan. At that point I made revisions in our contract based on the detail design.

Q. What were the estimates in the facility plan, if you recall, for Contracts 1 through 5?

A. I can approximate it but it would take me a minute to give you the — the total costs for Allen Park which included engineering and contingencies was $22,105,000.

Q. $22,105,000. Now, did that include the retention basin?

A. No, sir.

Q. So, that would be the equivalent of the facility's plan estimate for Contracts 1 through 5?

A. That's correct.

Q. Now, in the construction costs reflected in the bids as set forth in Exhibit 28 which you concur, I take it, to the actual bid costs?

A. Yes.

Q. Do those bid costs include engineering and contingencies?

A. No, sir.

Q. But the facility's plan estimate of $22,105,000 does?

(679) A. Yes, sir.

Q. And of the facility plan estimate of $22,105,000, what portion of that did you say was contingency engineering?

A. Approximately 30 percent would be contingency and engineering and other costs.

Q. 30 percent of the $22,105,000?

A. Yes, sir.

Q. So, the actual estimated construction costs at that time for contracts 1 through 5 was a figure equal to 70 percent of $22,105,000?

A. No, sir. To get the answer you divide by 130 percent.

Q. Okay. I understand. Now, to your knowledge, did the revised construction estimate from the Hayden firm, therefore, increase the estimates from the facility's plan itself?

A. Are you referring to Exhibit 28?

Q. Yes.

A. Yes, sir.

Q. Were you aware of those revised estimates at the time they were prepared by the Hayden firm?

A. February?

Q. Either — no. I don't mean the February, 1980 letter. I meant the time of bidding or prior to bidding.

A. The revised estimate at that point in time?

Q. Yes.

(680) A. I can't recall being aware, no. I could go through my files and see if there is a letter there, but I just don't recall it.

Q. Mr. Trimm, do you have a hand calculator with you that you have been using this morning?

A. Yes.

Q. Would you mind, please, for everyone's convenience making a computation on what the actual construction costs were in the facility's plan for Contracts 1 through 5?

A. I just did it. It is 17 million.

Q. Pardon?

A. I just did it. It is 17 million.

Q. That would be the cost that would now be comparable to the numbers as shown in the first column of the low bid construction costs of $37,809,198?

A. That's correct.

Q. Mr. Trimm, when were those contracts let for bid?

A. In June of 1978.

Q. And was there a time limitation for contractors to submit bids on those contracts?

A. Yes, sir.

Q. And how long did a contractor have to submit a bid?

A. I can't say the exact number. It was at least four weeks but I don't know exact — on that particular contract. I have a specs book here. I could look it up.

* * *

(683) * * * Q. The other kinds of items?

A. That's correct.

Q. Let me ask you, Mr. Trimm, doesn't that come up a drop short on this document?

A. This document —

Q. Or am I miscalculating?

A. This document shows the actual markup is less than 30, which shows that the costs are slightly less than the 30 percent. We use a 30 percent number to typically reflect in the very early stages of planning what we would estimate to be those costs. This is actually a more detailed workup after bidding. So, this would be more precise — and it happens to be less expensive.

Q. So, you are suggesting that the contingency item on Line 7 is somehow an actual item?

A. No. It is the item that EPA will now approve. Once you get past bidding, the EPA will loan only a 10 percent contingency. Once you reach — once you receive the bid, your grant eligibility is down to 3 percent.

Q. Do the contract specifications for these contracts, 1 through 5, include any other provision for extras?

A. I would have to look at the contract again to answer that question.

* * *

(691) * * * Q. You say the timing is in the project?

A. Yes.

Q. If there is an easement delay and the contractor cannot complete, then the contractor has to pay a penalty of some kind for delay?

A. There is a provision — just a minute. I will have to check that to be sure. There is liquidated damages provided in each of the contracts which is to provide a penalty to the contractor if he does not complete within time. So, it is a method of encouraging him to meet his schedule.

Q. In other words, if a contractor has an easement procurement delay, then you would have to in the bid figures anticipate for the potential liquidated damages provision?

A. If he did not meet the deadline in the contract, then he would have to put into his bid the liquidated damages, the anticipated liquidated damages.

The Court: Mr. Trimm, so it is clear, you previously identified Defendant's Exhibit 25, which is the proposed construction map within Allen Park.

The Witness: Yes.

* * *

(717) The Court: Thank you.

Mr. Emery: With that, Your Honor, it completes our presentation.

The Court: Your next witness.

Mr. Berg: Your Honor, the plaintiff contractors call Raymond Canale.

RAYMOND CANALE, a witness for and in behalf of the contractors, having been duly sworn by the Court, was examined and testified upon his oath as follows:

Direct Examination

By Mr. Berg:

Q. Would you state your full name, please?

A. Raymond P. Canale.

Q. What is your business address and residence address?

A. My business address is the Department of Civil Engineering at the University of Michigan in Ann Arbor. My residence address is 424 Onaway in Ann Arbor, also.

Q. Your occupation?

A. I am a professor in the department of civil engineering at the University of Michigan Department of Engineering.

Q. Are you a full professor?

A. Yes.

Q. Would you describe your college and post-graduate education?

(718) A. Yes. I attended college at Syracuse University in New York where I received my undergraduate and graduate degrees in sanitary and environmental engineering. I received my Ph.D. in 1978.

Q. Did you also receive an M.S. in sanitary engineering?

A. That's correct.

Q. Where did you receive that?

A. Syracuse University as well.

Q. Are you a registered professional engineer in any state?

A. Yes; I am a registered professional engineer in the State of Michigan. I received that in 1969.

Q. Have you prepared a resume which sets forth in more detail your background and publications?

A. Yes, I have.

Mr. Berg: I am going to have marked for identification as Exhibit 32 —

Q. (By Mr. Berg) I hand you Proposed Exhibit 32 and ask you if that is the resume that you prepared?

A. Yes, it is.

Q. What is the date of that?

A. March 1st, 1979.

Q. Generally, what is covered?

A. Generally, it covers my education, academic appointments at the University of Michigan, consulting and work experience; (719) my professional background and professional affiliations and publications in

professional journals as well as research conducted at the University of Michigan during my time.

Mr. Berg: I will move for the admission of this exhibit.

Mr. Feiler: No objection.

The Court: It may be received.

Q. (By Mr. Berg) Are you familiar with the Ecorse Creek drainage basin area in Wayne County?

A. Yes, I am.

Q. How did you first become familiar with this area?

A. I was asked by Mr. Berg and Mr. Friedman to study this area in connection with combined sewer overflow problems.

Q. Have you done such investigations previously with respect to other areas?

A. Yes. I have been involved in determining the impact of combined sewer overflows for many other aquatic systems.

Q. Can you briefly describe some of your past experience with combined sewer overflow investigations?

A. Yes. As a consultant, I have participated in a study of the Genesee River which is on Lake Ontario in New York State, where we studied the various alternative control bodies, the impact of fecal coliform, BOD and other pollutants with combined sewer discharges, and subsequent to the field study, we performed mathematical analysis to determine the impact of (720) the discharges. We did a study in Onondaga —

Q. When you say "we," did you personally do this work or did other people do it and you supervised it?

A. I was both the supervisor and consultant to a larger project.

Q. If you could continue with your description, I would appreciate it.

The Court: Well, I think Professor Canale's qualifications are admitted, are they not?

Mr. Feiler: They certainly are, Your Honor.

The Court: Why don't we get to it.

Q. (By Mr. Berg) What did you do in this case to carry out your investigation of the Ecorse Creek?

A. My first task was to review all of the literature relating to the impact of the overflows on Ecorse Creek, DNR reports, the facility's plan and other documents.

I examined data that was available from various sources such as Starrett; I performed some independent analyses as well, and finally I have both laboratory and mathematical type analyses.

Q. Did you make any personal observations?

A. Yes; I visited the area about five times.

Q. And how recently were your visits?

A. Within the last few weeks.

(721) Q. And during your visits, did you observe any of the combined sewer overflows?

A. Yes, on several occasions I witnessed articles of various types associated with sanitary sewage, such as toilet paper and fecal matter.

Q. At what location did you observe this material?

A. In the north branch of the creek and also at the railroad bridge siding on the confluence area just west of Jefferson Avenue.

Q. Is that the bridge that you were present at, I believe, on April 16th of this year when the Court took a view?

A. That's correct.

Q. Did you also obtain any samples personally?

A. Yes. I obtained samples particularly of the bottom sediments in the area on three different occasions.

Q. Can I ask you to locate on this chart the locations where you took samples?

A. Yes.

Q. And is that chart present here in court today?

A. Yes.

Q. Could you approach the blackboard, please. I am going to mark this as a proposed exhibit. I think it is 33. What is the title of this proposed exhibit?

(722) A. It is entitled "Ecorse Creek, Combined Sewer Areas Alternative No. 1."

Q. Is it the same chart that was previously admitted into evidence as an exhibit, I think it was 5-A?

A. Yes, it's the same chart.

Q. And would you describe to the Court what you did with respect to this chart?

A. Yes. I simply used a green felt tipped pen to highlight the north and south branches of the creek as well as the confluence area. Then I marked it in red, various places along the north and south branches that I personally visited on several occasions, and then in addition I marked four different sites, labeled 1, 2, 3 and 4, where samples of the bottom sediment were obtained and then tested.

Q. Now, these red markings, do they indicate a position where you actually made a personal observation of either the north or south branch of the river or the confluence area?

A. Yes.

Q. Approximately how many of those are there?

A. There are approximately 35 sites along both the south and north branches and the confluence area that I visited.

Q. Over what period of time did these visits take place?

A. These visits were within the last few weeks.

Q. You indicated that there were about five visits; is that correct?

(723) A. That's correct.

Q. Approximately how long was each visit, if you recall?

A. On one trip, I drove down Goddard Road from west to east and cut across these various smaller side streets where there were bridges that intersected the creek, and typically, I would get out of my car and walk up and down and inspect the area and then drive on to another one.

And over a period of one day — I started on this upper reaches of the south branch and went all the way down, visiting the confluence area and worked my way back home along VanBorn Road. And again, there are many side streets that intersect the creek, and I visited places of easy access where I could walk up and down and inspect the area.

Q. On any of these visits, did you actually attempt to navigate the creek or the river?

A. Yes. In each of my trips I launched a canoe in the area of the LeBlanc Drain in the area of the north branch and visited up and down the north branch as well as in the confluence area.

Mr. Berg: Before I forget, I would like to move the admission of Exhibit 33 into evidence.

Mr. Feiler: No objection.

The Court: It may be received.

Q. (By Mr. Berg) With respect to the circled numbers in red, (724) 1, 2, 3 and 4, what do those represent?

A. Those circled numbers represent places where I actually physically obtained a sediment sample. Some of them were sampled on three different occasions and some of them sampled on one.

Site No. 1 was sampled three times on the south branch; Site No. 3 was sampled three times on the north

branch; Site No. 2 at the railroad bridge was sampled once; and Site 4 at north of Southfield Road was sampled once.

Q. Can you explain the purpose of taking particular locations for each of the four sampling points?

A. Yes. What I wanted to do was to try to get an idea of what the bottom sediment was, what they were like and how they were affected by combined sewer overflows.

So, the first item on the south branch, which is just west of Allen Road, was selected as a site that I thought was representative of the bottom sediment as unaffected by combined sewer overflows.

Then I worked my way down, and my next site was at Station 2, which was the confluence area and the railroad bridges, and there was a station that I felt was impacted by the overflows, many combined sewer overflow sites.

Station 3 was a similar station except it was on the north branch just downstream of LeBlanc Drain.

(725) Q. Is that downstream on the outfall that we have been referring to as 001?

A. That's correct. It is downstream of that outfall just about the confluence with the south branch.

Station 4 was selected upstream of several of the overflows in the north branch area but not completely free of all overflows, and selected as kind of an intermediate station.

Q. Have you selected samples at the various points — and you can take the stand again — what did you do with the samples?

A. The sediment samples were transported back to Ann Arbor and subsequently tested. The bottom sediments were tested for various kinds of measures of biological activity and demand for oxygen.

Q. And could you briefly describe the result of your testing, what conclusions you reached from your testing?

A. Yes. Basically, we tested the sediments for their potential to strip oxygen out of overflowing water. So, tests were performed to measure the rate at which oxygen would be absorbed by the sediment so that we could thereby project what might be happening in the river.

Our results indicated that there were high rates of oxygen uptake by the sediments downstream of combined sewer overflows and much reduced rates upstream of the combined sewer overflows.

(726) We also characterized on one occasion the sediments with respect to their organic content.

Q. Based on your testing and observations, do you have an opinion about the environmental impact of combined sewer overflows on the Ecorse River?

A. Yes, I have.

Q. What is your opinion?

A. Well, there are — I would like to characterize my opinion by describing several water quality measures.

One measure of the impact on the biological oxygen demand, I determined that the combined sewer overflows have a significant impact on the amount of biological oxygen demand, materials introduced into the river. The same conclusion can be made with regard to settleable solids that would be deposited in the river as a result of the overflows.

These two measures of pollution have an impact on the dissolved oxygen. And I determined that through my investigation of available data, that the dissolved oxygen has been depleted in the lower branch of the river.

I also measured the impact in terms of phosphorus. And I determined that combined sewer overflows contributed significant amounts of phosphorus to the

floor river; and finally, I characterized the impact in terms of (727) fecal coliform and had determined that combined sewer overflows cause large or high concentrations of fecal coliform in the river.

Q. Now, are these impacts which you have just described degrading to the environment of the river?

A. Yes. There are violations of recommended standards for dissolved oxygen, standards of five million grams per liter, as often observed in the summer to be violated in the lower river, and there are also violations of the fecal coliform standard as well.

The Court: Do you have any numbers that you could give us?

Mr. Berg: Your Honor, the witness has prepared a series of reports which I intend to introduce at the close of this testimony with the exact figures.

The Court: All right.

Q. (By Mr. Berg) Do you have an opinion as to whether the completion of what we have been referring to as Alternative 1 will abate pollution in Ecorse Creek?

A. Yes.

Q. What is that opinion?

A. My opinion is that the completion of the project will have a very definite beneficial impact in terms of the dissolved oxygen conditions in the river. My feelings are removal of the biological oxygen demand material as well as the (728) settleable solids will create a better situation for biological life and will result in significant increase in dissolved oxygen above those increases in fine concentrations, above the Michigan DNR standard of five milligrams per liter; and I also have concluded that the completion of the project will remove fecal coliform relating [*sic*] from human sources and broad sanitary sewers, and that will also provide a beneficial impact.

Q. Is the detailed basis for your opinion contained in the reports that I have referred to?

A. Yes. I have used the laboratory testing that I did as well as the mathematical analysis to make these conclusions.

Q. Have you had training and experience with mathematical analysis or modeling prior to this particular project?

A. That has been the major focus of my professional activity for the last 11 years. Yes.

Q. With respect to the Ecorse Creek situation, could you briefly describe what kind of mathematical modeling you prepared?

A. Yes. I prepared a model of oxygen content of the river, and it is based on the concept of math where masses balance. These techniques are used to incorporate in a simultaneous way the impacts of various environmental phenomena which would be affecting the dissolved oxygen in the creek.

So, these models are taking into account atmospheric reaeration, biological degradation of dissolved (729) organic materials, as well as the oxygen which would be required by the bottom sediments.

Q. Is your model based in part — I am referring to the model on the Ecorse Creek — on the personal observations and data which you obtained?

A. That's correct.

Q. Are the detailed calculations with respect to the model and the conclusions contained in your report?

A. That's correct, along with calculations and graphs demonstrating the results.

Q. Were you in court on last Thursday, I think it was April 24th, when Mr. Wilson testified for the DNR?

A. Yes, I was.

Q. Did you hear his testimony?

A. Yes.

Q. Did you also review, I think it was DNR Exhibit 24 which was the 1969 report he co-authored?

A. Yes, I have.

Q. Do you have an opinion or do you know whether the environmental conditions testified to by Mr. Wilson and referred to in that report, Exhibit 24, still exists?

A. The results of my testing were quite consistent with the results of Mr. Wilson approximately ten years ago.

We measured the percent or graphic contents of the sludges in the bottom station and found (730) results that were quite comparable.

Q. Would it be your opinion that those conditions still exist?

A. Yes, because we also observed similar textures and odors and general descriptions that were very similar to those observed by Mr. Wilson.

Q. Do you have any samples from the Ecorse River in court today?

A. Yes, I have.

Q. Could you get those samples and bring them to the witness stand, please?

A. Yes.

Mr. Berg: I am marking the first bottle as Plaintiff's Proposed Exhibit 34-A and the second bottle as 34-B.

Q. (By Mr. Berg) Now, with respect to 34-A and 34-B, are those samples which you collected from the Ecorse Creek?

A. Yes. I personally collected them.

Q. When did you collect them?

A. These were collected on —

Q. Was it within the last week or so?

A. I had some notes here. These samples were collected on April 19, 1980.

Q. Where was 34-A collected from?

A. 34-A was collected from Station 1 indicated on the chart on the blackboard.

(731) Q. That is Exhibit 33?

A. Yes.

Q. Where was 34-B collected from?

A. 34-B, the darker bottle, was collected at Station 3, which is just downstream of the LeBlanc Drain on the north branch.

Q. And how did you collect those samples?

A. Those samples were collected from a canoe with a ponor drudge.

Q. Is this a standard recognized method of collecting samples like these?

A. Yes. It is similar to a clam shell that you drop from the boat and it closes on impact with the bottom.

Q. Have you previously had training and experience with this form of collection?

A. Yes, I have.

Q. What was the purpose of your taking these samples?

A. I wanted to examine the physical characteristics of the two sludges and to subseqntntly test them in the laboratory.

Mr. Berg: Your Honor, I would move for the admission of these exhibits.

The Court: Any objection?

Mr. Feiler: I have no objection.

The Court: They both are admitted, that's 34-A and 34-B.

Q. (By Mr. Berg) Now, can you describe what the samples show, (732) if anything, about the environmental impact of combined sewer overflows on the Ecorse River? And what I am thinking of is, can you

demonstrate to this Court what kind of visual information you can obtain from these samples?

A. Yes.

Q. Would you do so, please.

A. Yes. The samples, 34-A, the brown bottle, if you look at it carefully, you can observe a rather sandy clay texture of a grey color. It is basically — does not have much odor. What odor there is is a musty odor, and it indicates to me conditions of relatively understood environment with respect to organic materials.

Q. And again, 34-A was taken at Sampling Point 1?

A. That's correct. That's upstream on the documented, combined sewer overflow sources. So, in general, this indicates not an unpleasant situation with respect to the condition at the bottom sediments, being the brown bottle. The black bottle contained —

Q. 34-B —

A. — contains a sediment that has a visual difference in terms of color, and indicates high concentrations of organic material such as would be found in domestic sewage. It has a very strong odor characteristic of hydrogen-sulfide and a (733) texture characteristic, almost identical to digested sludge that could be found in any municipal sewage treatment plant.

Q. Is this commonly referred to as a sludge?

A. That's correct.

Q. Do you have any idea as to how deep the sludge condition exists at the point where you took 34-B?

A. Yes. In our investigation, we went up and down the confluence area as well as the north branch from the canoe and measured the sludge deposits with a pole, as was done by Mr. Wilson back in 1970, and found that this black-type sediment covers a wide area of the creek to depths of about six feet. And this is viewed — my observations were from the railroad bridge backing up to

the LeBlanc Drain, this black sludge being approximately six feet deep all the way across.

Q. If you know, how will Alternative 1 affect the sludge conditions that you have described?

A. If Alternative 1 is completed, the amount of solids that enter the river which have a potential to create this organic sludge would be dramatically reduced.

Q. Have you had occasion to observe such conditions in other rivers and streams other than the Ecorse River?

A. Yes, I have.

Q. How would you compare the conditions in the other rivers that you have observed with what you have described here (734) today?

A. In general, I would say that the water quality conditions of the Ecorse River are one of the most seriously degraded environments that I have observed.

Q. Based on what you have observed and know, did it surprise you that Mr. Wilson testified that he thought it necessary to use rubber gloves when he took his samples?

A. Didn't surprise me at all.

Q. Would you still think that would be a proper precaution to take today?

A. Yes.

Q. Did you prepare any reports based on your observations and testing and sampling?

A. Yes, I have.

Q. I am going to show you what I have marked for identification as Exhibit 35 and ask you if you can identify it?

A. Yes. This is a memo I wrote regarding a visit to Ecorse Creek on March 27.

Q. 1980?

A. 1980.

Mr. Berg: I move for the admission of this exhibit.

Mr. Feiler: No objection.

The Court: It may be admitted.

Q. (By Mr. Berg) I am handing you what has been marked for (735) identification as Exhibit 36 and ask you if you can identify that document.

The Court: Why don't you put them all in, Mr. Berg.

Q. (By Mr. Berg) Here is 37, 38. Are these all reports that you have prepared and that you have referred to in your testimony?

A. That's correct, yes.

The Court: What are the dates?

Mr. Berg: Exhibit 37 is dated April 8, 1980 and has the title: "Summary of An Analysis of the Environmental Impact of Combined and Separate Sewer Overflows on the Ecorse Creek"; Exhibit 36 is also dated April 8, 1980 and is entitled: "Summary of Field Sampling and Laboratory Measurements of Sediment Oxygen Demand in the Ecorse River"; and Exhibit 38 is dated April 20, 1980 and is entitled: "Further Field Sampling and Laboratory Measurement of Sediment Oxygen Demand in this Ecorse River."

Does one of these reports have a typographical error that you want to refer to?

A. Yes, there is one typographical error that may be confusing in Exhibit 32 on Page —

Q. I think that is Page 37.

* * *

(763) Mr. Feiler: I am attempting to show that the assumptions that went into the model are not truly representative of actual data purportedly taken in the field on Exhibit 17.

The Court: Well, we are spending a good deal of time on this. If I understand Table 2 — and check me on it,

Professor Canale — what that data says is what the estimated average quality of a polluted situation is —

The Witness: Yes. Most of the parameters —

The Court: — on that data whatever went into it.

The Witness: Yes, but most of the parameters indicated by footnote 1 were actual measurements made by wade trim in the 1970's.

The Court: It is a polluted situation?

The Witness: Yes.

The Court: It is not a quality situation?

The Witness: That's correct.

The Court: What I can't understand, Mr. Feiler, is what you are comparing Table 1 in Exhibit 17 to Table 2 in Exhibit 37 for? This is a pollution situation, and this is a pollution situation under the data.* * *

* * *

(765) The Court: Which shows an average, a high and a low average as of that time. And you are comparing that with actual samples taken on March 31, 1980 which show a worse condition.

Now, what are you trying to get at? I am trying to figure out, looking at this evidence from the standpoint of what you are suggesting through it what the impact should be on my mind. And all I find right now is that you are comparing rotten apples to rotten apples.

Mr. Feiler: What I am trying to suggest to the Court is that there is opportunity to really learn what the situation is, and that the Court is being asked, at least through Dr. Canale's direct testimony, to utilize a model type prediction whereas there is certainly ample opportunity through actual measurement to determine what the true facts are.

The Court: Well, the reason that we cannot do that is that this is still April 30th. We are not in July or August

of 1980, and the case has got to be decided now. What he is trying to do is to show what the situation may be at other times.

The Witness: That's correct.

The Court: That has some purpose. I have learned in this case — * * *

* * *

(778) Q. Mr. Moon, did you yourself, prepare or have this document caused to be prepared?

A. I prepared it myself.

Mr. Downs: Your Honor, I don't believe that this has yet been admitted, and I now move its admission.

The Court: Any objection?

Mr. Feiler: No objection.

The Court: It may be admitted.

Q. (By Mr. Downs) Mr. Moon, referring to the first page of this document, the bottom line, Line 18 contains a figure of $12 million which indicates the amount of bonds issued —

The Court: Do you have a copy of that or is it — Thank you.

A. You are referring to the second page which is entitled, "Estimated Cost Section?"

Q. (By Mr. Downs) Yes.

* * *

(816) By Mr. Feiler:

Q. Mr. Hamilton, would you state your full name and business adress for the record, please?

A. James Lee Hamilton, 900 Lafayette, Detroit, Michigan.

Q. By whom are you employed?

A. The Wayne County Department of Public Works.

Q. In what position?

A. Chief engineer.

Q. How long have you been employed in that capacity?

A. By the department for approximately 12 years, in the position of chief engineer, for approximately two.

Q. Mr. Hamilton, what are your functions as chief engineer?

A. During the last two years, they have been primarily administrative, working on sewerage disposal rates, personnel, budgets, also reviewing the operations and maintenance of the department as far as treatment and interceptor mains.

Q. Mr. Hamilton, you are familiar, I take it, with the context of this litigation?

A. Yes.

Q. The Ecorse Creek Pollution Abatement Project?

A. Yes.

Q. Can you indicate, please, which of the facilities involved, or I can make that more specific if necessary, but which of the facilities involved comes under the jurisdiction of (817) your department?

A. It is related to this case, the Wyandotte interceptor which I believe you referred to as River Drive; the appurtenances attached to it; the regulating devices, and the Wyandotte Treatment Plant.

Q. Mr. Hamilton, you are familiar with certain gates that exist in the LeBLanc Drain?

A. Yes, I am.

Q. Does your department exercise jurisdiction over those gates?

A. Yes, we do.

Q. And can you tell me, does your department own the gates or do you just maintain them?

A. We maintain the gates.

Q. Do you know who owns them?

A. No. I am not sure of ownership.

Q. Is there any relationship between your department and the LeBlanc Tile Drainage District?

A. I am not sure of the question as far as relationship.

Q. Are there any contracts, to your knowledge, or other working relationships between your department and the entity known as the LeBlanc Tile Drainage District?

A. Not that I am aware of.

Q. Mr. Hamilton, does your department regularly maintain these gates?

A. Yes, we do.

(818) Q. How often are they maintained?

A. Well, there are two types of gates. I am not sure to which you are referring —

Q. Let me make the question more specific, then. What I am referring to are certain gates which variously have been described as tide gates or discharge gates that would allow liquid within the LeBlanc Drain to discharge into the Ecorse Creek. Are you familiar with those gates?

A. Yes.

Q. And you are familiar with the construction of those gates?

A. Yes, I am.

Q. And they are made out of what material?

A. Redwood tempers, probably.

Q. To your knowledge, are there any mechanical devices on those gates for opening or closure?

A. No. They are hand gates.

Q. Do you know how long those gates have been in existence?

A. I believe since the construction of the downriver interceptor, approximately 1939.

Q. Do those gates contain any kind of alarm system in the event they become mechanically stuck open?

A. No, they do not.

Q. Is it possible for them to be mechanically stuck open?

A. Yes, it is possible for a log or other object to become (819) lodged in the gates.

Q. In fact, has that occurred in your experience at any time?

A. I am sure it has occurred. We maintain some 60 regulators — at least in some instances it must have occurred.

Q. How would anyone learn of a condition whereby the gates were stuck upon [*sic*] with a log?

A. It is our department policy and maintenance that every regulator is maintained at least monthly, perhaps bi-weekly and at every incident of rainfall, the crews inspect those gates immediately following the rainfall.

Q. Could you describe the situation that occurs if the gates are forced open by, or held open by some foreign object or some solid object?

A. As far as the relationship of flows?

Q. Yes, to your facility.

A. If the gates were stuck open and the flows in the LeBlanc Drain were low, which would be a condition of dry weather flow, and the elevation in Ecorse Creek were high, it would cause Ecorse Creek to come back through the gate and actually enter our interceptor.

If the conditions were such that the levels in the LeBlanc Drain were higher than the creek, regardless of the gate stuck open, then the flows would actually be flowing from the LeBlanc Drain into Ecorse Creek.

Q. To your knowledge, Mr. Hamilton, has there ever been any (820) metering, monitoring or other determination of when those gates open?

A. To my knowledge, there has not been.

Mr. Feiler: I have nothing further, Your Honor.

The Court: Any questions of Mr. Hamilton?

Mr. Tiplady: I have just one question, Your Honor.

Cross-examination

By Mr. Tiplady:

Q. Mr. Hamilton, you testified that after each rain you inspect the gates on all of the gates that your department operates; is that correct?

A. Yes.

Q. What is the purpose of that inspection?

A. The purpose is to investigate for just this occurrence that could happen, that the gate could be stuck open allowing the river backed through the interceptors, to make sure that they are not stuck in dry weather flows until the next regular inspection, so that raw sewage would be discharged.

Mr. Tiplady: Thank you.

The Court: You are excused. Thank you.

(Witness excused.)

The Court: Your next witness.

* * *

(827) Mr. Feiler: Your Honor, I have a somewhat unusual request to make of the Court. And if the Court faults me for it, I will stand faulted. I discussed with Mr. Emery the possibility of arriving at, by mutual agreement on some of these items which may be detailed by Mr. Latsch. We are prepared to go ahead and present it. It seems to me, though, that with a little investment of time at this point, we may just save quite a bit of time by coming to grips with certain items that Mr. Latsch will testify to. I know I am being somewhat eliptic on details,

but I can assure the Court that my reasons are well motivated.

The Court: You mean you want to see if you can get a stipulation from plaintiff's counsel, that if Mr. Latsch testified, that he would testify as follows as to the various conclusions that you seek in your stipulation?

Mr. Feiler: Yes, Your Honor.

The Court: Fine, if counsel will agree to that.

* * *

(832) The Court: Well, I would guess, Mr. Feiler — that's not his purpose —

Mr. Feiler: That's correct.

The Court: — because that wouldn't help him much. We all recognize that happens in construction. That's not his purpose. His purpose is, if I understand it, it is to show that the whole thing is not going to work.

Mr. Friedman: You have already ruled, Your Honor, that he can't go behind Alternative 1.

The Court: No, I haven't gone that far. I have not said that he can't show that there is complete idiocy to this thing. Obviously, if he were able to convince me that this is a mad caper, the design of a bunch of demented people, and after that there was no way in which it would work — I am overstating the point in order to make it, Mr. Feiler — he certainly ought to be able to show me that. Because I wouldn't want to join their ranks.

Mr. Friedman: If the Court please, if that were the purpose of Mr. Feiler, then I would suggest to the Court that he is stopped from doing —

The Court: What do you care, Mr. Friedman if I give him the opportunity to show that? All that he is saying is that he wants a stipulation. He is not asking you to accept it; he is not asking you to say it is true.

(833) He is simply saying, in order to save time and present his case, he thinks he can work out a stipulation with you men, that if Mr. Latsch testifies, he will testify to the following circumstances.

Mr. Friedman: I am not objecting to the procedure, Mr. Feiler suggests. I am objecting to the line of testimony, Your Honor.

The Court: Well, if the effect of that testimony, unchallenged, is that the conclusion was escapable, that this separation of sewers in Allen Park as contemplated by almost two of the facility's plans just wouldn't work, I think I would have to think about that.

I — you know, just talking about Mr. Moon's testimony here this morning, I wouldn't think that we would want willingly to allow people to buy bonds for a project that just simply wouldn't work.

Mr. Friedman: Well, I would like the Court to—

The Court: It's a rather desperate defense, but does that mean it shouldn't be permitted?

Mr. Friedman: I think that this line of defense that you have just characterized does violence to your earlier ruling, and in addition to that, Mr. Feiler should be stopped from making such a claim because the sewer system represented by Contracts 1 through 5, were represented * * *

(835) Mr. Friedman: To the contrary, Your Honor, the testimony of Mr. Trimm was —

The Court: I am ready to rule on this. I do not put this offer of proof that Mr. Feiler proffers in the same category as the ruling that I made in connection with his other offer. It seems to me that with regard to this storm sewer, by this testimony, he is not suggesting that I review what the agencies have done.

What he is in effect suggesting, I think is this: That if his proofs should be of the nature apparently that he

thinks it is, that would compel me to say: "This will never work. This project is incapable of being carried forward. EPA, DNR, all of the consultants, all of the engineers have really missed the boat on this one. I am convinced that this just isn't going to work."

I think he should have a chance to say that.

Mr. Friedman: Thank you, Your Honor.

The Court: I would be somewhat apprehensive if I didn't give him that chance. A reviewing court might say that I go too far.

* * *

(852) The Court: So, it can be solved in the event that private negotiations are unsuccessful?

The Witness: Oh, yes. The problem is elemental, but the problem becomes one of credits, what is the value of the credits.

The Court: But it can be done?

The Witness: Yes, it can be done.

Q. (By Mr. Feiler) Mr. Pierce, are you familiar with the drain known as the LeBlanc Drain?

A. Yes, I am.

Q. And who is the owner of that drain?

A. The LeBlanc Drainage District. It's a combined storm, sanitary sewer serving basically the same areas.

Q. And can you indicate, please, the nature of the entity of the LeBlanc Drainage District?

A. The LeBlanc Drainage District is a body corporate the same as the Ecorse Creek Abatement District except the LeBlanc Drainage District participates in storm water and sanitary water during — through the LeBlanc Drain, which is a combined six to eight barrel sewer completely covered.

Q. Mr. Pierce, did you have occasion to review the quesion of existing right-of-way casements of laterals that go into the LeBlanc Drain?

A. Oh, yes. * * *

(876) * * * Q. Let's talk about 1 through 4. At least those four contracts must all be hooked up, finished and tested before the house leads can be hooked up; is that correct?

A. Yes.

Q. To enable the home to have a place to put sewage while the construction is going on?

A. Yes.

Q. So, the contractor has to go through this site twice, at least?

A. I would think so, yes.

Q. Isn't that right?

A. Yes.

Q. And isn't it true that the portion of the work which you have drawn on Exhibit 47, which lies outside of the permanent easement, at least under those contract documents, remains the contractor's problem?

A. Yes. That's the way I read them.

* * *

(880) Q. That's a costly enterprise for the contractor, isn't it?

A. Much more cost, yes.

Q. Much more costly than doing the whole thing at one time?

A. I would think so.

Q. And it is also true that the connection of the new sewer to the house is part of the included cost of installing the pipe, is it not? In other words, the house lead or the house connection is an included item as opposed to a separate pay unit item?

A. I believe it is. I would have to go through the proposal.

Q. So, the contractor absorbs that cost in his enterprise?

A. Yes.

Q. And you have already testified that the contractor cannot install the house lead until the whole contract, 1 through 4, is complete with the retention basin, and some time may pass, which is not within the control of the contractor; isn't that true, because he must depend on other contractors to complete their work before he can come back and do his, right?

A. That is true.

Q. And isn't it true that the cost of construction has been escalating over the past number of years?

A. Definitely.

Q. So, the longer time that passes, the more costly it is to him?

(881) A. That's true.

Q. Isn't it also true that if the contractor feels in his judgment that he doesn't have enough room to dig a trench to open cut down to do his work, he could tunnel that contract?

A. That is an option of the contract, yes.

Q. And isn't it also true that even if he tunnels there is still certain work that has to be done from the surface such as the installation of manholes, the installation of shafts from which to tunnel or through — by which he can do his tunneling operation?

A. Yes.

Q. So even if he elects to tunnel, he still has certain surface restoration work to do, doesn't he

A. Yes.

Q. Isn't it also true that in this contract, that in surface restoration, whether open cut or periodic surface work, there is a two-step restoration requirement in the contract? Do you remember that?

A. Yes, I remember something about that.

Q. The contractor has to come in and install a temporary asphalt paving so that people can use the streets, and then he has to come back again and do a separate permanent payment restoration?

A. In some areas, yes.

(882) Q. That's costly, isn't it?

A. Yes.

Q. And tunneling is more costly than open cut?

A. Yes.

Q. Now, would it be a true statement to say that you took the excess or extra cost considerations which we have just gone into, into consideration when you performed your review of bids on Contracts 1 through 5?

A. Yes.

Q. And you included the two steps installation problem?

A. It was included, but as you mentioned, we don't know the time factor involved and when he has to come back and hook the house leads up. So, it is pretty hard to estimate.

Q. It might even be more extensive than the figure you put into your estimate, and you included the two-step pavement restoration consideration?

A. I don't think I included that.

Q. So that the actual construction would still be, in those instances, more expensive than your estimate?

A. Maybe a little bit more, yes.

Q. Now, would it also be a true statement to say that you had difficulty including in your review of bids a cost for the obtaining of easements?

A. Yes. That's an unknown factor, as I say.

Q. It's unknown?

(883) A. It's an unknown cost as I see it.

Q. Would it be fair to say that when you produced a cost for the purpose of comparing to the actual bids, your cost didn't even include a construction easement component?

A. It included a cost, but how valid the cost is, I can't say.

Q. Do you remember the figures that you came up with in your bid review?

A. Yes. I used $10 a foot.

Q. I don't mean the unit cost. Do you remember the total contract price, for lack of a better word, that you computed in estimating the cost of Contracts 1 through 4?

A. That was in the neighborhood of $44 1/2 million.

Mr. Tiplady: Was that 1 through 4 or 1 through 5?

The Witness: 1 through 5.

Q. (By Mr. Friedman) Now, when you made an attempt to figure the cost of obtaining the easements, did you use a certified appraiser in attempting to arrive at that cost?

A. No.

Q. You didn't have someone competent in the field and licensed to do so, go through all of the construction sites and make an estimate as to what it would cost to maintain permission from the owner and do the restoration?

A. I did not.

Q. Now, let me ask you this: Based on your experience, do you (884) feel competent to pass judgment on somebody else's estimate of easements?

A. No.

Q. Did the cost component for the easements that you used reach the proportions of $2.4 million by any chance?

A. I think it was in the neighborhood of one million.

Q. Is the customary method of arriving at the cost of obtaining easements, if you had a real — if your firm had a real contract to do this kind of work for an owner that was contemplating doing a project, would the customary method of doing the work be to get a certified appraiser to go through and get a cost certified appraisal of the easement? Isn't that customary in the industry?

A. It is customary for the owner to do this, and the owner would have an appraiser appraise his property.

Q. So, if in fact, hypothetically, a certified appraiser went through and appraised the cost of the easements at 2.4 million, would it be appropriate to take your 34.5 million and add another 1.4 million to it?

A. Yes.

Q. Which aould come to 35.9 million, wouldn't it?

A. Yes.

Q. Your million dollar component for the easements was included in the 34.5?

A. Yes.

(885) Q. Excuse me, for the —

Mr. Feiler: Your Honor, this was Mr. Friedman's request for cross-examination. I notice he is in conference at this point. May I ask that he either conclude, excuse the witness or finish his examination — or do something.

The Court: He said: "Do something."

Mr. Friedman: Oh, okay.

Mr. Feiler: It's a do nothing objection.

Q. (By Mr. Friedman) When you say that caisson could not be sunk on this typical job site, is that because the contract does not provide for caisson work as an alternative to this problem?

A. As you see here on the drawing, it is a detail from the contract document, and this is the only way that the contract documents allow the leads to be put in.

Q. If the contractor was not able to negotiate an easement and the drain commissioner, for some reason, didn't want to help him by condemning some construction room, could the contractor apply to the owner, through the consulting engineer, for permission for a change order so that a caisson or other construction means be used to make this house connection?

A. There is a change order, part of the contract, if they could negotiate a change order.

* * *

(895) Q. You actually prepared the proposed easement documents themselves?

A. Yes, my firm did.

Q. How many easements were there that you prepared at that time?

A. Well, there are stacks of them, but I would say in the neighborhood of around three, four hundred. The exact count, I really don't know, but there are quite a few of them, stacks and stacks of them.

Q. Did you in fact prepare those easements pursuant to a separate contractual agreement with the drain commissioner?

A. Yes.

Q. Were you paid for preparation of the easements?

A. Yes.

Q. May I ask what amount you were paid?

A. I don't have the figures here with me. I would have to check with my bookkeeper.

Q. Mr. Benker, what point in the bidding process were you advised of the actual bids received on Contracts 1 through 5?

A. Right after the bids were obtained, the drainage board referred the bids to the various consulting

engineers. The bids for Contracts 1 through 5 were referred to L.N. Hayden, Incorporated for review and recommendation.

* * *

(899) The Court: Did you object to that?

The Witness: Yes, I objected to that.

The Court: In writing?

The Witness: No, not in writing.

The Court: To whom did you object, Mr. Benker?

The Witness: Whe we had —

The Court: Just answer my question: To whom did you object?

The Witness: To whom: I objected to the team of engineers that I worked with and also —

The Court: Who were they?

The Witness: Wade, Trimm Associates and Pate, Hirn and Bogue.

The Court: What did you say?

The Witness: Well, I felt that because Allen Park had the largest amount of work to be done than the other contracts, I felt that we should have more time to bid this project out, to give the contractors who might be interested in bidding the contract who were under contract in other areas which I had contacted, that at least 60 days should be given.

(900) The Court: When you made that statement as you said to the engineers, for whom were you making that estimate?

The Witness: For whom?

The Court: Yes.

The Witness: For the Wayne County Drain Commissioner, the Drainage Board of Ecorse Creek.

The Court: Did you have any relationship with Allen Park at that time?

The Witness: Yes.

The Court: What was that relationship?

The Witness: City engineer.

The Court: Did you make that recommendation as city engineer?

The Witness: To the City of Allen Park?

The Court: No, to the three engineers.

The Witness: No. I made that recommendation as a design engineer under contract with the Ecorse Creek Drainage Board, as Wade and Trimm and Pate, Hirn and Bogue were the city engineers for the City of Taylor, the City of Dearborn Heights and the City of Lincoln Park.

The Court: But you didn't make it on behalf of Allen Park?

The Witness: No, not at all.

* * *

(910) The Witness: The water being diverted by the City of Taylor would be diverted to the open reservoir.

Q. (By Mr. Feiler) Mr. Benker, I am not sure that you are responding directly to the Court.

The Court: I think he has.

Q. (By Mr. Feiler) I will ask him again. If the present element to final facilities plan as it relates to Allen Park is not active, that is to say, if the sewers in Allen Park are not separated as contemplated by Element 2 of the final facilities plan, would it not be detrimental to the entire Ecorse Drain project to leave it lay in status quo?

A. Yes.

The Court: Yes. That's what I asked and that's what he answered.

Mr. Feiler: I understand the question and I understand the answer, Your Honor. I was addressing my question as to detriment to a different kind of detriment.

The Court: Well, I suppose it depends on whose ox is being gored — let me ask one other question. Will we not be able, will we, Mr. Benker, in your opinion, to correct the pollution in the Ecorse Creek to the extent it is being polluted by waste water, by sewage, unless this project is completed?

The Witness: Yes, that's correct, we won't be able to.

The Court: All right.

Q. (By Mr. Feiler) Mr. Benker, if Contracts 1 through 5 are placed or were in the ground today without the existence of Contract 13 in place, could there be detrimental impact to the City of Allen Park — and I think —

The Court: Is there any difficulty, and disagreement on that by anyone? We all know that 13 at some point has to be implemented, don't we, in some way? Does anybody disagree with that? I think you have made your point.

Mr. Feiler: Your Honor, I would suggest that —

The Court: We can't do without 13 — some kind of retention basin — it is clear from the testimony that I heard, I think Mr. Trimm testified to that rather completely — has to be structured somewhere in this basin — maybe not in Lincoln Park, I don't know, but somewhere it has to be done because the present treatment plant at Wyandotte is not able to receive all of these waters (912) and treat them with secondary treatment.

Mr. Feiler: Your Honor, may I suggest that the last comment by the Court was part of our proof that was precluded to me.

The Court: I don't know that I precluded that. I freely allowed Mr. Trimm and anybody else here to tell me that. And all I am saying to you is that I recognize that it would be incomplete to think of doing 1 through 5

without doing 13. We have got to do 13 in some way. You made that point. And it would be detrimental not to do 13.

Mr. Feiler: I wanted to go further. The witness indicated that aside from financial implications, there could be other detrimental impact.

The Court: I accept that. Does anyone object to that? That there would be not only financial but also environmental detriment? There is no objection to that, is there? Everybody agrees on that.

Mr. Feiler: May I place on record the kind of environmental detriment that there might be?

The Court: If you want to, but everybody will agree. You see, if your concern, Mr. Feiler, is that there is some move effort to get 1 through 5 without (913) getting 13, I haven't hear that — if that's your fear. And if the resolution of this project can only be obtained, as it apparently appears from the testimony that I have heard so far, by a retention basis, then that's got to be part of the remedy. I certainly wouldn't agree, unless there is some reason that I haven't thought of yet or that the lawyers have not presented, that any relief that could be ordered here would exclude 13. It if fundamental.

Q. (By Mr. Feiler) Mr. Benker, with regard to your letter of February 15, 1980, in what capacity did you write that letter?

A. In the capacity of project director under contract with the drainage board for the Ecorse Creek Pollution Abatement Drain No. 1.

The Court: Did you make it clear in that letter that you were not writing as city engineer for Allen Park?

The Witness: Yes.

The Court: What did you say?

The Witness: I signed it as project director, and I addressed it to Mr. Charles N. Youngblood, Wayne County Drain Commissioner, and I referenced it as Ecorse Creek Pollution Abatement Drain No. 1, Allen Park portion, and gave the C number.

* * *

(915) Q. Now, Mr. Benker, the figures that are shown in Exhibit 28, you show Contracts 1 through 5, low bid construction costs, revised estimated construction costs and percent low bid over or under revised estimate; is that correct? You have that in your copy?

A. Yes.

Q. Could you indicate specifically what each column refers to?

A. Well, I gave the contract number —

The Court: It speaks for itself, doesn't it, Mr. Feiler? It is right there. How can he improve on it? It says it as clear as a crystal, doesn't it?

Mr. Feiler: It is clear to Your Honor?

The Court: It is clear to me. That really was the thing that was uppermost in your mind when you wrote this letter — from your own point of view now, and I accept for the purpose of my question, Mr. Benker, that you were acting as consultant to the drain commissioner. You were concerned that the fact that the bids were too high?

The Witness: Definitely.

Opposition

1

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF ALLEN PARK,
Petitioner,

vs.

STATE OF MICHIGAN, THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GREENFIELD CONSTRUCTION COMPANY, INC., LANZO CONSTRUCTION COMPANY, INC., GIANNETTI CONSTRUCTION OF MICHIGAN, INC., ROCCO FERRERA & COMPANY, INC., and ROBERT LINDISCH,
Respondents.

BRIEF OF CONSTRUCTION COMPANIES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

WHERE RAW, UNTREATED SEWAGE IS DISCHARGED BY A CITY'S COMBINED SEWER SYSTEM INTO SURFACE WATERS BEFORE REACHING A TREATMENT PLANT, WAS THE LOWER COURT CORRECT IN HOLDING THAT PETITIONER MUNICIPALITY IS SUBJECT TO NPDES PERMIT POLLUTION ABATEMENT REQUIREMENTS UNDER THE CLEAN WATER ACT AND STATE LAW?

II

WHERE A VOLUMINOUS ADMINISTRATIVE RECORD WAS IN EVIDENCE, WAS THE TRIAL COURT CORRECT IN APPLYING THE ARBITRARY AND CAPRICIOUS STANDARD IN REVIEWING AGENCY ACTION TAKEN PURSUANT TO THE ADMINISTRATIVE RECORD?

III

WHERE ALLEN PARK'S OFFER OF PROOF WAS VAGUE, DID THE TRIAL COURT PROPERLY REFUSE TO RECEIVE EVIDENCE WHICH WAS CALCULATED TO INDUCE THE COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE AGENCIES AS TO THE METHOD THAT SHOULD BE SELECTED TO ABATE RAW SEWAGE POLLUTION?

IV

DID THE DISTRICT COURT CORRECTLY RULE THAT ALLEN PARK'S CHALLENGE TO THE EPA'S ACTIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT IS BARRED BY THE EQUITABLE DOCTRINE OF LACHES?

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CITATION TO THE OPINION AND JUDGMENT BELOW

The trial court's Final Order and Judgment filed July 1, 1980 appears at A 11 (Petitioner's Appendix).

The November 6, 1980 trial court opinion is reported at 501 F Supp 1007 (ED Mich 1980), and appears at A 13. The October 8, 1981 Order of the Sixth Circuit Court of Appeals affirming the district court judgment has not been reported, but is reproduced at A 10.

JURISDICTION

The jurisdiction of this Court is based on 28 USC 1254(1). On November 23, 1981 the Sixth Circuit Court of Appeals filed an Order denying a Petition for Rehearing (A 9).

STATUTORY PROVISIONS

1. Clean Water Act. Section 301(a) of the 1972 Amendments to the Federal Water Pollution Control Act (now known as the Clean Water Act, or CWA), 33 USC 1311(a) and

Section 402, 33 USC 1342.

2. The National Environmental Policy Act of 1969 (NEPA), 42 USC 4321 et seq.

3. The Michigan Water Resources Commission Act (WRCA). Michigan Compiled Laws (MCL) 323.6 and 323.7.

4. The Michigan Drain Code of 1956. MCL 280.463 and MCL 280.467.

STATEMENT OF THE CASE

A A Decade Of Severe Pollution Caused By The Discharge Of Raw Sanitary Sewage, In Part, From Allen Park's Combined Sewer System

The trial court's Opinion reviews the facts in some detail. These facts bear repeating here as they relate to the issues raised by Petitioner City of Allen Park, Michigan. The history of the pollution of the Ecorse Creek is a long one, plagued by delay in abating the pollution despite agreement by all involved that the discharge of raw sanitary sewage must be controlled.

In May 1969, the Michigan Water Resources Commission (WRC) studied the water quality problems of the Ecorse River together with a plan of correction. The study found that during wet weather, flows in the combined sewer system of the communities involved (including Allen Park) were high. As a result, untreated domestic sanitary sewage and stormwater runoff are discharged into the North and South Branches of the Ecorse Creek at various

outlets (A 13).[1] The WRC study confirmed in detail that the discharge of combined sewer overflows into the river was the prime cause of its "severely degraded condition" (A 14). The specific pollutants are described by the trial court based on the expert testimony of witnesses Canale (University of Michigan Professor of Environmental Studies) and Michigan Department of Natural Resources (MDNR) experts Kilmer, Willson and Sprow (A 25-29). The pollutants found included fecal coliform, organisms associated with the human digestive tract, and also associated with water-borne diseases such as hepatitis and typhoid.

In November 1970, as a result of the WRC study, the MDNR ordered the communities within the Ecorse Creek Basin (including Allen Park) to correct pollution emptying into the Ecorse Creek and the Detroit River. As a result, defendant Charles N. Youngblood, the Wayne County Drain Commissioner, authorized a study of the combined sewer systems of the

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[1] The letter "A" refers to the Appendix filed by Petitioner.

communities involved to find a solution to the water quality problems. The ultimate result was the "Facility Planning Study: Pollution Abatement of Ecorse Creek, Element 2 -- Combined Sewer Areas, Final Plan (Wayne County Drain Commissioner, February 1977" (A 14).

B The Facility Plan, Alternative 1 -- A Means To Control The Pollution Is Approved By Allen Park, MDNR And EPA

The Facility Plan was required pursuant to federal regulation in order to qualify any project selected for federal grant aid under Title II of the Clean Water Act (CWA), Section 201, 33 USC 1281 et seq. The regulations[2] detail the contents of the Facility Plan (40 CFR 35.917-1), including an adequate assessment of the expected environmental impact. Public participation is required (40 CFR 35.917-5). A public hearing on the Plan was held on January 27, 1977 (A 15).

[2] 40 CFR 35.917 et seq. (1977).

Acceptance of the Facility Plan by implementing government units is specifically required:

> "A facilities plan submitted for approval shall include adopted resolutions . . . of the implementing governmental units . . . providing for acceptance of the plan. . . ." 40 CFR 35.917-6.

Allen Park passed the required resolution on June 14, 1977 (A 17). As the trial court noted, prior to passing this resolution, Allen Park had several times already formally expressed its approval of Facilities Plan Alternative 1 (A 32 n 10). Alternative 1 of the Facilities Plan called for the cities of Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff (A 15).

The regulations also required approval of the Facility Plan by both the United States Environmental Protection Agency (EPA) and MDNR, 40 CFR 35.917-7 and 40 CFR 35.917-8. The approvals were given and EPA

and MDNR tendered Step III grants for federal and state financial assistance to implement the necessary construction program (A 16).

The Facility Plan examined three alternatives on the basis of monetary cost, contribution to water quality goals, public acceptability, environmental impact and implementation capability (A 14-15). Alternative 1 called for Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff. This alternative would provide for continuous treatment of domestic sanitary sewage at the Wayne County Wyandotte Wastewater Treatment Plant during all flow conditions and release only storm surface runoff to Ecorse Creek (A 15). The other two alternatives examined are described by the trial court at A 15.

The Facility Plan recommended selection of Alternative 1. It was selected by the North Branch of Ecorse Creek Drain Improvement after a public hearing on January 27,

1977 (A 15). Allen Park endorsed Alternative 1:

> "In a letter of January 4, 1977 to the Executive Director of the Southeast Michigan Council of Governments, Mayor Frank Lada of Allen Park expressed a 'very strong recommendation' for the proposed Alternative 1 of the Element 2 Final Plan. (P.Ex. 2, App. H). Similarly, the minutes of a public hearing of January 27, 1977 on the Final Facilities Plan state that Mayor Frank Lada indicated that Alternative 1 was the 'unanimous choice of himself and the Allen Park City Council.' (P.Ex. 2, App. E, Summary of Hearing at 3). In fact, the Allen Park City Engineer was a participant in the preparation of the Facilities Plan. (Trim and Benker testimony)." (A 32 n 10).

Alternative 1 received widespread governmental and citizen support based on the effects of the project. These effects included reduced energy use and costs for operation and maintenance of the Wyandotte Treatment Plant, a reduction of local basement flooding as well as risks to the public health and safety due to increased sewer system reliability, and improved water quality in the Ecorse Creek, the Detroit River and Lake Erie with reduction in solids, BOD, and phosphorus loading (A 15-16).

The specific discharge point involved in this litigation is referred to as Outfall 001. Outfall 001 is one of the locations where combined sewer overflows occur and contributes significantly to the pollution of the North Branch of the Ecorse Creek. The major source of the combined sewer overflow at Outfall 001 is the LeBlanc Drain, which serves the LeBlanc Tile Drainage District. This District is comprised of portions of Allen Park, Lincoln Park and Taylor (A 16). Construction of Alternative 1 would help abate the pollution occurring at Outfall 001 caused, in part, by Allen Park.

On June 14, 1977 the City of Allen Park Council passed a resolution (A 17) approving the financing of drain improvements and authorizing a petition to the Wayne County Drain Commissioner requesting drainage improvements pursuant to Chapter 20 of the Michigan Drain Code of 1956, as amended, Michigan Compiled Laws (MCL) 280.461 et seq. After petitions submitted by the cities of Allen Park, Dearborn Heights, Lincoln Park and Taylor, the

County of Wayne and State of Michigan, and following statutory notice and public hearings, MCL 280.467, a Final Order of Determination was entered on October 19, 1977. This Order determined that the petition for a drainage project (referred to as the Ecorse Creek Pollution Abatement Drain No. 1) was sufficient and that the project was necessary for the public health and should be constructed (A 17). Allen Park, the other communities and the drain commissioner had taken the steps necessary under both federal and state law to implement the project selected in the Facility Plan.

C Allen Park's Refusal To Pay Its Share Of Project Costs To Implement Alternative 1 Results In NPDES Permit Violation

On January 20, 1978 the MDNR issued National Pollutant Discharge Elimination System (NPDES) Permit No. MI-0026204 to the LeBlanc Tile Drainage District (replacing a prior permit issued on November 24, 1974). The NPDES Permit set forth conditions for

discharge from the LeBlanc Drain (A 17).[3]

The NPDES Permit authorizes discharges from the LeBlanc Drain until March 31, 1982, provided that the combined sewer overflows will be controlled by that time and that the LeBlanc Tile Drainage District complete construction of the sewer separation plan called for in the Element 2, Final Facility Plan (A 17-18).

Pursuant to CWA §201, 33 USC 1281 et seq., the EPA and MDNR tendered Step III grants for federal and state financial assistance to implement the required construction program (A 18). The EPA was to provide 75% of the funding of the grant-eligible portions of the project and MDNR was to provide 5% of such funding. The remaining 20% of the cost was to be allocated among the local units of government which had originally petitioned for the pollution abatement project -- Allen Park,

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[3] Discharges from Outfall 001 are regulated under the National Pollutant Discharge Elimination System, established by the 1972 amendments to the CWA, §101, 33 USC 1251 et seq.

Lincoln Park, Taylor and Dearborn Heights (A 18). Following statutory notice and a hearing on April 26, 1978, the drainage board for the Ecorse Creek Pollution Abatement Drain No. 1 confirmed a proposed apportionment of costs (A 18). An assessment roll was prepared which set Allen Park's apportioned cost at 52.9105% of the total local share amount of $20,040,981.76 to be assessed to the cities, State and County (A 18). The drainage district board divided the construction project into 13 construction contracts for work in the four communities involved and advertised them for competitive bidding. Bids were received on all 13 contracts and opened on June 27, 1978 (A 18).

The bids for the project were higher than the drainage board had originally estimated. In July 1978, based on the higher bids, Allen Park raised objections to the project. The other communities raised no objections. In August 1978, Allen Park filed suit against the drainage district for the Ecorse Creek

Pollution Abatement Drain No. 1, the Drain Commissioner and Treasurer of Wayne County and the County of Wayne, in Wayne County, Michigan Circuit Court, seeking an injunction against the project (A 19). The objections raised in the suit were solely financial. No NEPA suit was filed. No attempt was made to exhaust state or federal administrative remedies as to the Facility Plan or the NPDES Permit. This state court case settled when the parties, upon approval by the MDNR and EPA, agreed to divide the project into two segments (A 19).

Segment I of the divided project consists of Contracts 6, 7, 8, 9, 10, 11 and 12 and covers sewer separation and storm water control in the Cities of Taylor, Dearborn Heights and Lincoln Park, Michigan. Segment II consists of Contracts 1, 2, 3, 4, 5 and 13, and covers sewer separation, sanitary retention facilities and pumping facilities for the City of Allen Park (A 19). Segment II is the subject matter of this litigation. Pursuant to the state court suit

settlement agreement, the drainage district awarded only Contracts 6-11 and readvertised Contract 12 (A 19). Federal and state grants were received for Segment I and work on that segment is substantially complete (A 19).

Approval by MDNR and EPA of the segmentation was specifically conditioned upon the commitment of defendant Charles N. Youngblood, Wayne County Drain Commissioner, and the LeBlanc Tile Drainage District to complete Segment II by March 31, 1982 (A 19). If Allen Park now succeeds in blocking construction of Segment II, the effectiveness of Segment I in abating pollution, though already constructed, will be subverted. The EPA, MDNR and other communities have detrimentally relied on Allen Park's earlier endorsement of the project (A 33-34).

Contract specifications accompanying the bids for Segment II specify a needed construction time of 730 days (2 years). On December 14, 1978 EPA notified the Wayne County Drain Commissioner and the City of

Allen Park that, in accordance with the requirements of 40 CFR 35.930-4(b), the Drain Commissioner must commit to a schedule by which the various segments of the project would be accomplished (A 19-20). In reply, the Wayne County Drain Commissioner, Charles N. Youngblood, in a letter dated January 31, 1979, committed the drainage district to initiating construction of the Allen Park segment by March 1, 1980 and to completing construction of the project by March 31, 1982 as required by the NPDES Permit (A 20).

On November 28, 1979 the MDNR issued Notices of Violation to the City of Allen Park and the LeBlanc Tile Drainage District (A 20). The Notices of Violation were issued because, under the MDNR projected schedule for completion of the project by March 1982, the City of Allen Park and the LeBlanc Tile Drainage District had failed to initiate actions leading to the commencement of construction in March 1980, as required to meet the completion date (A 20).

On December 12, 1979 this litigation was commenced to compel Allen Park to pay its share of the project costs and to compel the project to be built as approved in 1977 by Allen Park, the EPA and MDNR (A 1). On April 15, 1980, trial started, and the EPA and MDNR were realigned as plaintiffs by order of the trial court (A 69).

On the day before trial, Allen Park filed a cross-claim against the EPA, attacking the sufficiency of the review process under the National Environmental Policy Act of 1969 (NEPA), 42 USC 4321 et seq. The trial court ruled that the cross-claim was barred by laches (A 102-103).

On July 1, 1980 a Final Order and Judgment was filed (A 11) directing Allen Park to "forthwith participate in the funding and construction" of Alternative 1 pollution abatement project. On November 6, 1980 the trial court issued its Opinion (A 13-49).

Allen Park appealed to the Sixth Circuit Court of Appeals which affirmed per

curiam by order dated October 8, 1981 (A 10). Allen Park's Petition for Rehearing and Suggestion for Hearing En Banc was denied by the Sixth Circuit by order dated November 23, 1981 (A 9). The Petition for Writ of Certiorari was received by counsel for respondent construction companies on February 24, 1982.

SUMMARY OF ARGUMENT

I

Allen Park is a discharger of pollutants under state and federal law (CWA) because it discharges raw, sanitary sewage into surface waters before the sewage reaches the treatment plant, contrary to the NPDES permit requirements.

II

A voluminous administrative record was admitted into evidence relating to selection of the project then endorsed by Allen Park. The trial court properly applied the arbitrary and capricious standard to reviewing the record.

III

Allen Park's offer of proof was vague and indefinite. The trial court correctly refused to substitute its judgment for that of the MDNR and EPA with respect to which alternative should be selected to abate raw sewage

pollution caused in part, by Allen Park.

IV

Allen Park failed to timely challenge EPA's actions under the National Environmental Policy Act of 1969, thereby prejudicing other communities which constructed their segments of the pollution abatement project. The equitable doctrine of laches was correctly applied to bar Allen Park's later attempts at a NEPA challenge to the project it had earlier supported.

ARGUMENT

I

WHERE RAW, UNTREATED SEWAGE IS DISCHARGED BY ALLEN PARK'S COMBINED SEWER SYSTEM INTO SURFACE WATERS BEFORE REACHING A TREATMENT PLANT, THE TRIAL COURT CORRECTLY HELD THAT PETITIONER MUNICIPALITY IS SUBJECT TO NPDES PERMIT POLLUTION ABATEMENT REQUIREMENTS UNDER THE CLEAN WATER ACT AND MICHIGAN LAW

Allen Park argues it is not a discharger of water pollutants subject to the NPDES permit pollution abatement requirements. The City contends the NPDES permit requirements are inapplicable where its combined sewer system terminates in a municipal wastewater treatment facility. Allen Park urges its position despite the fact that its raw sewage overflows directly into surface waters of the Ecorse Creek before reaching the treatment plant. The City's position is contrary to both state and federal law.

Allen Park's argument is completely based on the definition of "discharger" for

purposes of federal NPDES permits.[4] Here, however, Allen Park is attacking the requirements of an NPDES permit issued by the State of Michigan. Under Section 510 of the CWA, 33 USC 1370, a state may adopt more stringent requirements under its NPDES program than those compelled by federal law. See City of Milwaukee v Illinois, ___ US ___, 68 L Ed 2d 114, 128 n 14, 132-133 (1981).

Michigan adopted more stringent requirements than mandated by federal law. State law is clearly applicable in that event. EPA v California ex rel State Water Resources Control

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[4] Section 301(a) of the CWA, 33 USC 1311(a), forbids the discharge of any pollutant into waters of the United States, except in compliance with the NPDES permit program established by Section 402, 33 USC 1342. Section 402(a)(1), 33 USC 1342(a)(1), authorizes the Administrator of the EPA to issue a permit for the discharge of any pollutant if the source meets the "best technology" and related effluent limitations or, prior to their implementation, "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." See EPA v California ex rel State Water Resources Control Board, 426 US 200 (1976).

Under Section 402(b), 33 USC 1342(b), the Administrator must delegate to a state the authority to administer its own NPDES program upon a showing by the state of "adequate authority" to operate a permit program. Chapter 323 of the Michigan Water Resources Commission Act (MWRCA), MCL 323 et seq., provided the MDNR with such authority. The Administrator granted Michigan authority to administer the NPDES permit program (A 25).

Board, 426 US 200 (1976). Section 6(a) of the WRCA, MCL 323.6(a), prohibits the discharge directly or indirectly, into the waters of the state, any substance which is or may become injurious to the public health, safety or welfare. Section 6(b), MCL 323.6(b), provides that the discharge of any raw sewage of human origin, directly or indirectly, into waters of the state is prima facie evidence of a violation of the act ". . . by the municipality in which the discharge originated. . . ." Section 7(1) of the WRCA, MCL 323.7(1), prohibits any discharge into the waters of the state without a permit.

The trial court found the evidence established that pollutants contributed by Allen Park are being discharged into the Ecorse Creek and that by failing to proceed with the funding and construction of the pollution abatement project, Allen Park was in violation of the NPDES Permit (A 29-30).

Allen Park also asserts that the NPDES Permit was issued to the LeBlanc Tile Drainage District and not to the City. Allen

Park is an integral part of the District. Under state law, Allen Park is a member of the LeBlanc District, petitioned for its creation to protect the public health by abating raw sewage pollution and is one of the communities assessed for the costs incurred by the District (A 17). Michigan Drain Code of 1956, MCL 280.463, MCL 280.467.

Furthermore, the July 1, 1980 Final Order and Judgment (A 11) was directed against the defendant drainage districts and drain commissioner, not only Allen Park. These other defendants, including the LeBlanc Drainage District, did not appeal the Judgment. It is Allen Park's refusal to pay its assessed share of the project costs which has blocked the project from proceeding. On these facts, the trial court correctly held that Allen Park is bound by the NPDES Permit issued to the LeBlanc District (A 29-30).

Allen Park's argument must be rejected even if enforcement of the NPDES Permit were denied under state law. Allen Park has violated federal law. The City discharges raw

sanitary sewage and stormwater overflow at Outfall 001. This outfall is located before the system reaches the Wyandotte Treatment Plant. Section 301(a), CWA, 33 USC 1311(a), forbids "the discharge of any pollutant" into waters of the United States unless an NPDES permit is acquired under Section 402 of the Act, 33 USC 1342. "Pollutant," under the Act, includes "sewage" and "sewage sludge;" "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source;" and "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe . . . from which pollutants may be discharged." 33 USC 1362(6), (12) and (14).

The trial court found that Allen Park sends a pollutant (i.e., raw sewage) into a point source (i.e., a pipe) which, during wet weather, overflows at Outfall 001 directly into the Ecorse Creek, thereby causing an "addition" of a pollutant to a water of the United States (A 25-30). The discharge is illegal unless in compliance with the NPDES

permit requirements of Section 402, 33 USC 1342. The trial court found Allen Park did not comply with the NPDES Permit (A 25-30). In City of Milwaukee v Illinois, ___ US ___, 68 L Ed 2d 114 (1981), a case also involving overflows from a combined sewer system into a navigable waterway, the court stated that such overflows ". . . are point source discharges and, under the Act, are prohibited unless subject to a duly issued permit." 68 L Ed 2d, at 128.

Contrary to Allen Park's assertions, EPA has never interpreted the CWA as excluding from its coverage a discharger such as Allen Park. EPA regulations require that all "discharges" of "pollutants" to "waters of the United States" be covered by NPDES permits, 40 CFR 122.51(c), 45 Fed Reg 33440-33441. Allen Park points out that a discharger of sewage which is conveyed into a publicly-owned treatment plant need not obtain a permit. However, that fact is irrelevant here since the regulations specifically retain coverage of those sewage discharges, such as combined

sewage overflows, which go directly into surface waters before reaching a treatment plant. Thus, the exclusion from the permit program "does not apply to . . . discharges through pipes, sewers or other conveyances owned by a state, municipality, or other party not leading to a treatment works." 40 CFR 122.51(c)(2)(iii), 45 Fed Reg 33442.[5]

Allen Park also argues that it is not subject to an NPDES requirement because it exercises no control over the operation of

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[5] Allen Park argues that EPA regulations suggest a contrary result. The City asserts that an EPA regulation at 40 CFR, Section 125.4 exculpates it from coverage under the NPDES permit program. That claim should be rejected because, first, that regulation was repealed in 1979 (see 44 Fed Reg 32854 et seq.) and, second, because EPA's regulations, as discussed above, specifically include discharges of municipal sewage into a creek prior to reaching a municipal treatment plant.

the Wyandotte Treatment Plant.[6] The degree of control over that plant is, however, completely irrelevant to the question whether the City sends raw sewage into a water of the United States before that sewage reaches the plant. The trial court found Allen Park did discharge raw sewage at Outfall 001 before that sewage reached the treatment plant (A 28-29).

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[6] Allen Park's reliance on Montgomery Environmental Coalition v Fri, 366 F Supp 261, 267 (DC 1973), is misplaced. There, the court dismissed a state regulatory agency and county authorities from a CWA citizens suit seeking the abatement of municipal sewage pollution from a publicly-owned sewage treatment plant. The court granted dismissal of those entities because they exercised little or no direct control over discharges from a sewage treatment plant. Unlike the instant case, it was not alleged that the dismissed parties contributed wastewater into sewers which was discharged before reaching the treatment plant. In the case at bar, Allen Park "controls" a discharge through such an overflow by contributing its raw sewage to that discharge.

II

A VOLUMINOUS ADMINISTRATIVE RECORD WAS IN EVIDENCE. THE TRIAL COURT CORRECTLY APPLIED THE ARBITRARY AND CAPRICIOUS STANDARD TO REVIEWING AGENCY ACTION TAKEN PURSUANT TO THAT RECORD

Contrary to Allen Park's assertion, there was no lack of an administrative record. In fact, the administrative record was voluminous (A 38). The Element 2, Facility Plan was the culminating document of seven years of study (A 13-14, 38). Alternative 1 of the Facility Plan was the subject of a public hearing on January 27, 1977 and was widely endorsed, including by Allen Park's Mayor and City Council (A 15, A 32 n 10). The February 1977 Element 2, Facility Plan, Alternative 1, was approved by the MDNR and EPA as required by 40 CFR 35.917-7 and 40 CFR 35.917-8 (A 16).

On June 14, 1977 Allen Park's Council passed a resolution approving the financing of the drain improvements and the Alternative 1, Element 2 Facility Plan was determined necessary for the public health (A 17). The EPA

and MDNR tendered Step 3 grants for federal (75%) and state (5%) financial assistance for the project (A 18).

Allen Park enthusiastically supported the project and failed to timely invoke or exhaust its administrative remedies under both federal and state law (A 36-37). Allen Park did not at the time raise any of the objections it now asserts because it endorsed Alternative 1. The City did not timely challenge either Alternative 1 of the Facility Plan nor the NPDES Permit which incorporated Alternative 1 as a permit condition (A 36-37).

The trial court properly applied the arbitrary and capricious standard of review (A 37) and made detailed findings as to why the agency action in selecting Alternative 1 was not arbitrary and capricious (A 38-41).

The principles of law applied by the trial court are well recognized and do not warrant this Court's attention. For example, the exhaustion rule is clear: ". . . no one is entitled to judicial relief for a supposed or threatened injury until the prescribed

administrative remedy has been exhausted." Myers v Bethlehem Shipbuilding Corp, 303 US 41, 50-51 (1938).

Likewise, the arbitrary and capricious standard of review is clear and applies to reviewing decisions of the MDNR and EPA in approving Alternative 1. See Citizens to Preserve Overton Park v Volpe, 401 US 402, 416 (1971); Kleppe v Sierra Club, 427 US 390, 410 n 21 (1976); Bosco v Beck, 475 F Supp 1029 (NJ 1979), aff'd without opinion, 614 F2d 769 (1980), cert. denied, 449 US 822 (1980); Mid-Shiawassee County Concerned Citizens v Train, 408 F Supp 650 (ED Mich 1976), aff'd mem, 559 F2d 1220 (CA6 1976).

III

ALLEN PARK'S OFFER OF PROOF WAS DEFECTIVE. THE TRIAL COURT PROPERLY REFUSED TO SUBSTITUTE HIS JUDGMENT FOR THAT OF THE MDNR AND EPA AS TO THE ALTERNATIVE WHICH SHOULD BE SELECTED TO ABATE RAW SEWAGE POLLUTION

A Allen Park's Offer Of Proof At Trial Was Procedurally Deficient

Allen Park contends the trial court erred in not allowing testimony concerning alleged deficiencies in the Facility Plan. The court requested that Allen Park present to the court through its offer of proof the "hard evidence" indicating what rights of the residents of Allen Park were denied by the EPA and MDNR in the developmental stages of the project (A 88). The court granted Allen Park a recess to identify the proofs it would offer (A 88).

An appropriate offer of proof must show in some fashion the substance of the evidence the proponent wishes to have admitted. United States v Winkle, 587 F2d 705 (CA5 1979).

It stands in the same position as a pleading and is made for the purpose of first, informing the trial court so that it may rule advisedly, and, second, it preserves an exception to the exclusion of the offered evidence. 88 CJS, Trial, §73, at 179. The offer of proof must show that the proffered testimony would be neither vague nor indefinite. Bassett Furniture Industries of N C v N V F Co, 576 F2d 1084 (CA5 1978). The offer of proof must indicate with specificity and clarity that the facts being offered have legal significance to the issue at bar. See Viking Theater Corp v Paramount Film Distributing Corp, 320 F2d 285 (CA3 1963); J. Weinstein and M. Berger, Weinstein's Evidence, ¶103(04), at 103-38 (1977); 10 Moore's Federal Practice, §103.22 (2d ed 1976). Failure to make an adequate offer of proof precludes a finding of error under Rule 103(a)(2) of the Federal Rules of Evidence.

Allen Park's offers of proof wholly failed to set forth with any particularity the substance or manner in which the proffered

testimony would be presented. Numerous times, the court chided counsel for Allen Park that "The time for argument is not now" (App 89, 91). The court went to great pains to explain exactly what it sought in requesting the offer of proof. The court sought specificity and received generalities (A 88). The court sought facts and received argument (A 89). The court sought proofs and received conjecture (A 90). The court requested testimony and received conclusions (A 90).

Typical of the exchanges between the court and counsel for Allen Park is the colloquy at pages 89-90 of the Appendix:

> "THE COURT: What I want when I ask you to make me an offer of proof, is to tell me what your proof will be as to these costs. You can't simply say that they will be higher without telling me what your proofs will be.
>
> "We know that the bids in this case are, in your view, higher than they should have been.
>
> "MR. FEILER: Yes.
>
> "THE COURT: Now are you saying if they are done over again they will be higher

than that? Is that what you are saying?

"MR. FEILER: I am saying, Your Honor --

"THE COURT: Or lower than that?

"MR. FEILER: I don't know the specific answer to that.

"THE COURT: You see, I want to know if I permit you to put in proof in support of your theory, I want to know what that proof is. The time for argument is not now. The time now is to tell me that if your witnesses take the stand, they will testify to a certain line of proof. I want to know what that is.

"MR. FEILER: Your Honor, we will put in proof to show that the cost-effectiveness curve used in the analysis to date is inaccurate for two basic reasons --

"THE COURT: Don't give me the reasons, give me the proof. What will your costs be; what will you show it to be? What will the numbers be?

"MR. FEILER: Your Honor, as far as I know, it has not been determined.

"THE COURT: How can you prove anything if you put your witnesses on the stand and either you or I ask them the question and they say, 'I don't

know?' How do you prove what you are contending?

"MR. FEILER: Because, Your Honor, the cost-effectiveness curve was not based upon costs to Allen Park. It was based upon project costs.

"THE COURT: Just give me the numbers that will prove your observation as to that result. What is it that the witnesses will testify to from which a conclusion can be drawn that the requisite cost analysis or the requisite cost-effectiveness analysis was not done well?

"MR. FEILER: That, number one, the analysis was based upon an estimated construction and related cost of approximately $22 million.

"THE COURT: What do you say that your proof will show that the estimated cost analysis will be?

"MR. FEILER: Somewhere in excess of 44 or $45 million.

"THE COURT: If that is so, then I have just lost my sanity. Why are you objecting?

"If they are going to come in with figures that are substantially higher, do you believe what these contractors are willing to do -- why are you advocating that this be done -- unless I misunderstand your point --

> "MR. FEILER: Your Honor, I feel a little bit in something of a bind. My point in making this offer is to show the kind of testimony that we will produce dealing with these different matters that are contained in the analysis to date.
>
> "I frankly, Your Honor, don't feel qualified to stand here and tell the Court what our experts will ultimately testify to." (Emphasis added.)

An appropriate offer of proof by Allen Park would have set forth with specificity the type, form and substance of the testimony it sought to introduce. Allen Park's offer of proof was, instead, vague and indefinite, neither setting forth the proofs themsevles nor their potential impact on the litigation.

In fact, even had Allen Park been allowed to introduce testimony relative to the subject matter of its offers of proof, it would not have affected the court's decision. The court considered the subjects upon which

Allen Park made its offer of proof at trial.[7] The court specifically rejected each of the grounds raised in the offer of proof, holding none of the proffered proof established that the Facility Plan was arbitrary and capricious (A 39-41).

Allen Park also failed to mention that each of the grounds asserted in the offer of proof was in fact addressed and passed upon by Allen Park in its adoption of Alternative 1 of the Final Plan. On January 27, 1977 a public hearing was held on the Final Plan at which Allen Park's Mayor, Frank Lada, indicated that Alternative 1 was the "unanimous choice of himself and the Allen Park City Council" (A 32). At the time of its endorsement of Alternative 1 of the Facility Plan, Allen Park did not raise any of the grounds later raised by its offers of proof. Rather, on June 14, 1977 the City Council of Allen

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[7] The offer of proof related to the arbitrariness and inaccuracy of the Plan's cost-effective curves; the Plan's environmental assessment understated potential damage in Allen Park; that other viable alternatives were not discussed; and the Plan inaccurately reported reductions in stream BOD loadings.

Park passed a resolution approving the financing of the drain improvements and subsequently petitioned the Wayne County Drain Commissioner to initiate construction of Alternative 1 (A 17). Allen Park would have this Court ignore its involvement in the planning, development and adoption of the Facility Plan. Such a remedy, if granted, would undermine the entire facilities planning process and substitute the judgment of the courts for that of the agencies involved. This cannot be allowed. See Kleppe v Sierra Club, 427 US 390, 410 n 21 (1976); Bosco v Beck 1029 (NJ 1979), aff'd without opinion, 614 F2d 769 (1980), cert. denied, 449 US 822 (1980); Mid-Shiawassee County Concerned Citizens v Train, 408 F Supp 650 (ED Mich 1976), aff'd mem, 559 F2d 1220 (CA6 1976).

B The Trial Court Acted Properly In Forbidding Cross-Examination By Allen Park As To Alternatives To The Facility Plan

Allen Park assigns error to the trial court's decision to forbid cross-

examination on those issues addressed by Allen Park's inadequate offers of proof. The trial court properly determined that such inquiry was not probative to a determination of the action before the court (A 102-104). Despite the court's ruling, Allen Park persevered in its attempts to elicit testimony which, the trial court, after hearing arguments, considering briefs and through careful study of its own, found to be irrelevant (A 102-104).

The scope and extent of cross-examination is within the discretion of the trial court and will not be grounds for reversal unless clearly prejudicial. United States v Smaldone, 583 F2d 1129, 1133 (CA10 1978). Although cross-examination is an essential element of our system of adversarial advocacy, a party does not have an unrestricted right to cross-examine on any matter desired. The cross-examination must be shown to be relevant. The determination of relevancy is within the discretion of the trial court. N V Maatschappij, Etc v A O Smith

Corp, 590 F2d 415, 421 (CA2 1978); Skinner v Cardwell, 564 F2d 1381, 1389 (CA9 1977). As stated in Skinner:

> "Relevancy and the proper extent of cross-examination are closely interrelated. For example, a topic which is highly material deserves extensive cross-examination. But some topics may be of such minimal relevance that the trial court will be justified either in totally prohibiting cross-examination about them or in allowing only limited questioning. See United States v. Kelley, 545 F.2d 619, 623 (8th Cir. 1976), cert. denied, 430 U.S. 933, 97 S.Ct. 1555, 51 L.Ed.2d 777 (1977); United States v. Marshall, supra, at 1361 [526 F2d 1349 (CA9 1975), cert denied 426 US 933 (1976)]; United States v. Carrion, 463 F.2d 704 (9th Cir. 1972); Enciso v. United States, supra [370 F2d 749, 751 (CA9 1967)]."

The trial court determined the proper scope of inquiry by counsel for Allen Park in cross-examining witnesses. The scope of inquiry was determined only after Allen Park presented its offers of proof, the court had heard argument and ruled. The trial court's determination of relevance and its

decision to limit cross-examination in the areas addressed by Allen Park's offers of proof deserves great deference and should not be disturbed by this Court. See N V Maatschappij, Etc, supra, at 421; United States v Green, 523 F2d 229, 237 (CA2 1979), cert. denied, 423 US 1074 (1976).

Here, the trial judge did not abuse his discretion. Allen Park attempted by cross-examination to induce the court to substitute its judgment for that of the agencies. The authority previously cited supports the court's rejection of Allen Park's attempt.

Finally, this issue again involves settled principles of evidentiary law upon which it is not necessary for this Court to speak.

IV

THE TRIAL COURT CORRECTLY RULED THAT ALLEN PARK'S CHALLENGE TO EPA'S ACTIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) IS BARRED BY THE EQUITABLE DOCTRINE OF LACHES

The trial court found, based on a detailed review of the evidence, that Allen Park's challenge to EPA's actions under NEPA, 42 USC 4321 et seq., was barred by the equitable doctrine of laches (A 30-36). It would serve no purpose to here repeat in detail the district court's findings (See A 30-36). However, the highlights of those findings include the following:

1. Allen Park filed no objection to EPA's decision not to prepare an Environmental Impact Statement (EIS) in 1977, during the formulative stages of the environmental review (A 31).

2. Allen Park did not assert any NEPA objections to the project in 1978 when it filed a state court

suit challenging the project on solely financial grounds (A 33).

3. Allen Park repeatedly endorsed the project during the formative stage (A 32 n 10).

4. Allen Park's own engineer helped formulate the project plans (A 32 n 10) and testified that failure to complete the Allen Park segment of the project would be detrimental to the two other communities which had virtually completed their segments of the project (A 32).

5. The various specific concerns of Allen Park were not timely raised and were outweighed by the public interest in abating raw sewage pollution (A 35-36). Allen Park's own engineer admitted the project was needed to abate sewage pollution (A 179).

Challenges to various projects under NEPA for failure to prepare an EIS have been

considered extensively by the federal courts since the Act was passed in 1969. The principles of law are well developed and do not require further attention by this Court. The following settled legal principles were applied by the trial court here:

1. Importance of raising NEPA challenge at formulative stages of a project, so later steps are undertaken with a full appreciation of the risks. Washington Utilities and Transportation Commission v FCC, 513 F2d 1142, 1169 (CA9), cert. denied, 423 US 836 (1975). See Vermont Yankee Nuclear Power Corp v NRDC, 435 US 519, 549-555 (1977).

2. Arbitrary and capricious standard applies to reviewing a decision not to prepare an EIS. Kleppe v Sierra Club, 427 US 390, 412 (1976).

3. "Hard look" requirement tempered by a practical rule of reason. New York v Kleppe, 429 US 1307, 1311 n 1 (1976).

4. Laches can apply in context of environmental litigation. Save Our Wetlands v U S Army Corps of Engineers, 549 F2d 1021,

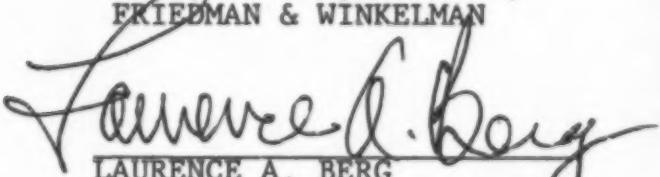
1026 (CA5), cert. denied, 434 US 836 (1977); Sierra Club v Alexander, 614 F2d 474 (CA5), cert. denied, 449 US 919 (1980); Shiffler v Schlesinger, 548 F2d 96 (CA3 1977); City of Rochester v U S Postal Service, 541 F2d 967 (CA2 1976); and Township of Parsippany - Troy Hills v Costle, 503 F Supp 314 (NJ 1979), aff'd mem, 639 F2d 776 (CA3 1980).

CONCLUSION

No reason exists for this Court to grant Allen Park's Petition. The principles of law are settled and were correctly applied to the facts by the trial court and Sixth Circuit Court of Appeals.

Respectfully submitted,

HYMAN, GURWIN, NACHMAN, FRIEDMAN & WINKELMAN



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Dated: April 1, 1982

Appendix

33 USC 1311(a)

§1311. Effluent limitations

Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 USC 1342

§1342. National pollutant discharge elimination system

Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of such necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection,

reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under

section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to

carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall

approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which --

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of

pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State, whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted

by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment

standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introduction of pollutants into such works from a source which would be subject to section 1311 of this tile if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under

this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit

application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to

paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of subh objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

Other regulations for safe transportation, handling, carriage, storage and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall

be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge

shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediatley prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section with such 180-day period.

Irrigation return flows

(1) The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Adminis-

trator directly or indirectly, require any State to require such a permit.

42 USC 4321 et seq.

§4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 USC 4331

§4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particulary the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster

and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degredation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Responsibility of each person to contribute to preservation and enhancement of environment

(c) The Congress recognizes that

each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 USC 4332

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter,

which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and,

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a

program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assess-

ment of such impacts and views for incorporation into such detailed statement. The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a

decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

42 USC 4333

§4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

42 USC 4334

§4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

42 USC 4335

§4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Michigan Compiled Laws (MCL) 323.6

§323.6 Unlawful discharges into waters, designation, evidence, remedies, penalties, nuisance

Sec 6. (a) It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters; or which is or may become injurious to the value or utility of riparian lands; or which is or may become injurious to livestock, wild animals, birds, fish, aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.

(b) The discharge of any raw sewage of human origin, directly or indirectly into the waters of the state shall be considered prima facie evidence of a violation of this

section by the municipality in which the discharge originated unless the discharge shall have been permitted by an order or rule of the commission. If the discharge is not the subject of a valid permit issued by the commission, a municipality responsible for the discharge shall be subject only to the remedies provided in section 7. If the discharge is the subject of a valid permit issued by the commission pursuant to section 7, and is in violation thereof, a muncipality responsible for the discharge shall be subject to the penalties prescribed in section 10.

(c) A violation of a provision of this section shall be prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this act may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction.

Michigan Compiled Laws (MCL) 323.7

§323.7 Waste discharge permit, necessity, issuance, conditions, revocation; violations, procedure

Sec. 7. (1) After April 15, 1973, a person shall not discharge any waste or waste effluent into the waters of this state unless he is in possession of a valid permit therefor from the commission. Compliance with the terms of an outstanding order of determination or final order of determination or stipulation with the commission that is in effect on April 15, 1973, shall be deemed to meet the requirements of this section until the commission issues its permit. The commission shall condition the continued validity of a permit upon the permittee's accomplishment of such effluent requirements as the commission deems necessary to prevent unlawful pollution by such dates as the commission deems to be reasonable and necessary and to assure compliance with applicable federal law and regulations. If the commission finds that

the terms of a permit have been, are being, or may be violated, it may revoke the permit or grant the permittee a reasonable period of time in which to comply with the permit. The commission shall reissue a revoked permit upon a showing satisfactory to the commission that the permittee has corrected the violation by providing the necessary collection or treatment facilities and has adequately arranged for their operation.

(2) Whenever in the opinion of the commission a person is causing or is about to cause unlawful pollution of the waters of this state, the commission may notify the alleged offender of its determination. The notice shall contain, in addition to a statement of the specific violation which the commission believes to exist, a proposed permit or other action which it deems appropriate to assure timely correction of the problem and shall set a date for a hearing on the facts and proposed action involved, the hearing to be scheduled not less than 4 weeks nor more than 8 weeks

from the date of the notice of determination. Extensions of the date of hearing may be granted by the commission or on request. At the hearing, any interested party may appear, present witnesses, and submit evidence. A person who has been served with a notice of determination may file a written answer thereto before the date set for hearing or at the hearing may appear and present oral or written testimony and evidence on the charges and proposed requirements for abatement of pollution contained therein. If a person served with the notice of determination agrees with the terms of the proposed permit and period of time for abatement of pollution which the commission deems necessary and notifies the commission thereof before the date set for hearing, disposition of the case may be made with the approval of the commission by issuance of a permit without further hearing. The permit approved and issued by the commission following the hearing as authorized by this section shall be conclusive, unless reviewed

in accordance with Act No. 306 of the Public Acts of 1969, as amended, in the circuit court for the county of Ingham, for the county in which the person resides or for the county in which the violation occurred, upon petition therefor filed within 15 days after issuance of the permit to the person.

Michigan Compiled Laws (MCL) 280.463

§280.463 Same; public health; petition; contents, filing, notice, water resources commission order of determination

Sec. 463 When it is necessary for the public health to locate, establish and construct a county drain, then a petition therefor may be filed with the county drain commissioner signed by 2 or more public corporations which will be subject to assessments to pay the cost thereof. The petition shall state that it is filed pursuant to this chapter and shall describe the location and route of the proposed drain sufficiently to determine with reasonable certainty the areas to be drained thereby. Within 20 days after the petition is filed, the county drain commissioner shall notify all public corporations which may be subject to an assessment or in which are located any of the areas to be drained, as described in the petition, that a petition was filed. Attached to the petition shall be a certified copy of the resolution of

the governing body of each signer authorizing the affixing of its signature thereto. The petition may be filed in more than 1 counterpart. For a petition filed by a county, the county board of commissioners shall authorize its execution, and for a petition filed by the state, the state highway commission shall so act. As provided in section 423 an order of determination of the water resources commission shall also serve as a petition made pursuant to this chapter.

Michigan Compiled Laws (MCL) 280.467

§280.467 Same; tentative determination; name; district assessed; hearing of objections, notice, form; final order of determination

Sec. 467. The drainage board, at its first meeting, shall consider the petition for the project and make a tentative determination as to the sufficiency of the petition and the practicability of the proposed drain, and shall further make a tentative determination of the public corporations to be assessed. The drainage board shall give a name to the drain and to the drainage district. The district shall be composed of the public corporations to be assessed for the cost of the project. After the drainage board has made the determination it shall fix a time, date, and place it will meet to hear objections to the proposed drain and the petition for the drain, and to the matter of assessing the cost of the drain to the designated public corporations. Notice of the hearing shall be published twice in the county by inserting the

notice in at least 1 newspaper published in the county, designated by the drainage board, with the first publication to be not less than 20 days before the time of the hearing. The notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that a notice to the state shall be sent to the state highway director and a notice to a county shall be sent to both the county clerk and the county road commission. The mailing shall be made not less than 20 days before the time of the hearing. The notice shall be signed by the chairperson and proof of the publication and mailing of the notice shall be filed in his or her office. The drainage board may provide a form to be substantially followed in the giving of the notice. After the hearing, the drainage board shall make a determination as to the sufficiency of the petition, the practicability of the drain, whether the drain should be constructed, and if so, the public corporations to be assessed,

and shall issue its order accordingly. The order shall be known as the final order of determination. A public corporation shall not be eliminated from, or added to, those tentatively determined to be assessed without a rehearing after notice.

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

I, LAURENCE A. BERG, being first duly sworn, certify that on April 1, 1982 forty (40) copies of Brief of Construction Companies in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed by first-class mail, postage prepaid, to the Clerk of the United States Supreme Court, No. 1 First Street, N.E., Washington, D.C. 20543. These briefs are submitted pursuant to Rule 33.7, Supreme Court Rules, within the time permitted by that Rule. I further certify that on April 1, 1982 one (1) copy of the substituted Brief in Opposition to Petition for Writ of Certiorari was mailed by first-class mail, postage prepaid, to each of the following counsel of record at the addresses indicated:

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I further certify that all parties

required to be served have been served.

LAURENCE A. BERG

Subscribed and sworn to before me
this First day of April, 1982.

VICTORIA LYNNE BONUS, Notary
Public, Wayne County, Michigan;
Acting in Oakland County, Michigan

My Commission Expires: July 23, 1985

Opposition

2

81-1555

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

CITY OF ALLEN PARK,

Petitioner,

vs.

STATE OF MICHIGAN, THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GREENFIELD CONSTRUCTION COMPANY, INC., LANZO CONSTRUCTION COMPANY, INC., GIANNETTI CONSTRUCTION OF MICHIGAN, INC., ROCCO FERRERA & COMPANY, INC., ROBERT LINDISCH AND BILL SERPETTI, JR.,

Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT STATE OF MICHIGAN'S BRIEF IN OPPOSITION

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1. DOES THE DECISION OF THE LOWER COURTS THAT PETITIONER ILLEGALLY DISCHARGES RAW SEWAGE IN VIOLATION OF STATE AND FEDERAL LAW AND PERMITS CONFLICT WITH DECISIONS ON THE SAME MATTER BY OTHER COURTS OF APPEAL OR THIS COURT?

2. DOES THE DECISION OF THE LOWER COURTS THAT PETITIONER ILLEGALLY DISCHARGES SEWAGE IN VIOLATION OF STATE AND FEDERAL WATER POLLUTION LAW AND PERMITS RAISE ISSUES OF SUFFICIENT IMPORTANCE THAT THIS COURT SHOULD GRANT CERTIORARI?

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IN THE

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Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT STATE OF MICHIGAN'S BRIEF IN OPPOSITION

The Respondent State of Michigan respectfully requests that this Court deny the Petition For Writ of Certiorari, seeking review of the Sixth Circuit's decision in this case.

OPINIONS BELOW

The decision of the trial court was reported at 501 F Supp 1007 (1980) (A. 13). The decision of the Sixth Circuit summarily affirming the trial court has not been reported. (A. 10). The Order Denying Petition For Re-Hearing was issued by the Sixth Circuit on November 23, 1981. (A. 9).

JURISDICTION

The jurisdiction section of the Petition is acceptable to the Respondent State of Michigan.

STATUTORY PROVISIONS INVOLVED

Consideration of this Petition involves analysis of the following statutory provisions:

United States Code, Title 33

§ 1331(a) Effluent Limitations (A. 1a)*

§ 1342 National Pollutant Discharge Elimination System (A. 1a)

Michigan Compiled Laws

§ 323.6 Unlawful Discharges Into Waters (A. 5a)

§ 323.7 Waste Discharge Permit (A. 6a)

§ 280.463 Public Drains (A. 8a)

§ 280.464 Drainage Boards (A. 9a)

§ 280.467 Drainage Boards (A. 10a)

STATEMENT OF THE CASE

Petitioner's statement of the case is unacceptable to the State of Michigan because it contains excessive argument and insufficient objective statement of facts. Consequently, the State of Michigan sets forth the following statement of the case.

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*References to Petitioners' appendix are shown as (A. 1) and references to Respondents appendix are shown as (A. 1a).

This case involves pollution of the waters of the north branch of the Ecorse Creek which is located in Wayne County, Michigan. The Creek has been extensively polluted over the years and in May, 1969 the Michigan Water Resources Commission (WRC) initiated surveys to determine what action would be necessary to correct water quality problems in the Creek. (A. 13) The studies confirmed that the river was severely degraded and the principal cause was combined sewer overflows containing raw sewage from adjacent municipalities, including petitioner. (A. 14)

In November of 1970, the Michigan Department of Natural Resources (DNR) ordered the communities within the Ecorse Creek watershed to correct the discharge of this raw sewage into the Ecorse Creek. As a consequence, the Wayne County Drain Commissioner authorized a study of the sewer systems in the affected communities to determine solutions to the pollution problems. This study culminated in the Facility Planning Study: Pollution Abatement of Ecorse Creek, Element 2—Combined Sewer Areas, Final Plan dated February, 1977 (Plaintiff's Exhibit 2). This study proposed three alternatives for the abatement of pollution to the Ecorse Creek. Following extensive public hearings and discussions, Alternative 1 (hereinafter "Alternate 1 project") was chosen for implementation. This alternative was agreed to by all parties including the City of Allen Park. (A. 15, 17a)

About two-thirds of the City of Allen Park utilizes a combined sewer system which mixes domestic sewage from residences and other structures with rain and storm water. The combined sewage and storm water flows through the combined sewers to the Le Blanc Drain. (A. 16) The main portion of the Le Blanc Drain flows through the cities of Taylor, Allen Park and Lincoln Park. When the combined sewage flows from Allen Park and the other cities approach the north branch of the Ecorse Creek, they flow into what has been referred

to as a "junction chamber". (P. Exh #7) During periods of dry weather flow, the combined sewage then enters an interceptor sewer which carries it to the Wyandotte Wastewater Treatment Plant. However, during wet weather conditions, i.e., rainfall in excess of .4 inches, the combined flow in the Le Blanc Drain exceeds the capacity of the interceptor sewer that carries the sewage to the treatment facility. (A. 16) In that event, water levels in the drain rise until they exceed water levels in the north branch of the Ecorse Creek. On such occasions, two large gates open and allow large quantities of combined sewage and storm water to flow into the north branch of the Ecorse Creek.

On Janauary 20, 1978 the DNR Water Quality Division issued a Pollution Permit, NPDES Permit No. MI-0026204 (A. 11a) pursuant to State law. The permit set forth conditions for discharge from the Le Blanc Drain into the north branch of the Ecorse Creek. The Permit was issued to the Le Blanc Tile Drainage District, of which Allen Park is one member. Continued permission to the Le Blanc Tile Drainage District to discharge to the north branch of the Ecorse Creek was conditioned on the requirement that Alternate 1 Project be constructed. The Alternate 1 Project, in part, involved the separation of sewers in various portions of the communities of Allen Park, Lincoln Park and Taylor. Insofar as Petitioner is concerned, it involved separation of sewers in approximately two-thirds of that City. For various reasons not pertinent here, the implementation of the sewer separation projects required by the Element 2 Facility Plan and the NDPES Permit were separated into two segments. Segment 1 involved work primarily in the cities of Taylor and Lincoln Park and has proceeded to completion separate and apart from that portion of the project involved in Allen Park. The Allen Park portion, Segment 2, is what is at issue in this case.

When it became apparent to the DNR that the Le Blanc Tile Drainage District, which includes the City of Allen Park, would not comply with the construction schedule contained in the NPDES Permit, this enforcement action was considered. In November, 1979, the State of Michigan issued a notice of permit violation to the Le Blanc Tile Drainage District and Petitioner. (A. 13a) However, before such enforcement action was filed in court, Respondent construction companies and Respondents Lindisch and Serpetti initiated individual federal actions against Allen Park for its failure to proceed with the Element 2 project. These two actions were consolidated by Order of the Court dated February 25, 1980. The consolidated actions named the Michigan Department of Natural Resources and the Administrator of the Environmental Protection Agency as defendants. By order of the Court dated April 15, 1980, the DNR and the United States Environmental Protection Agency were re-aligned as parties plaintiff. The matter was tried essentially as an NPDES Permit enforcement action by the State of Michigan against the City of Allen Park.

NATURE OF THE POLLUTION

The discharge of combined raw sewage (A. 20a) and storm water from the Outfall 001 has caused pollution from contaminants such as biochemical oxygen (BOD), suspended solids and excessively high counts of fecal coliforms. In addition, the discharges have released excessive amounts of the nutrient phosphorus to the river. (A. 20a) BOD is a measure of the amount of oxygen consuming organic matter contained in the wastewater discharges to a water course. Excessive BOD has caused the dissolved oxygen in the river to drop below the minimum established by State law. Fecal coliform are organisms associated with the digestive track of warm blooded animals including human beings and they can provide an in-

dication of potential presence of disease causing interic organisms in water courses. These interic organisms are associated with the potential of water borne diseases such as hepatitis and typhoid. On occasion, they have been found in the river at as much as 300 times greater than the allowable level. The nutrient phosphorus in excessive quantities in water courses encourages high biological activity including high densities of nuisance algaes such as blue green algae. This high biological activity further increases the quantities of oxygen demanding organic matter within the water course. High levels of suspended solids have caused sludge to accumulate on the river bottom. The sludge also utilizes available oxygen. (A. 21a and 22a)

REASONS FOR DENYING THE WRIT

This litigation essentially is an enforcement action by the Michigan Department of Natural Resources against the City of Allen Park for violation of its duly authorized NPDES Permit No. MI-0026204, (hereinafter "the Permit"). The trial court correctly determined, based on all the evidence presented, that the City of Allen Park had violated their Permit and therefore ordered compliance with that Permit by ordering construction of the Element 2 Facility Plan sewer separation project required by the Permit. The Sixth Circuit summarily affirmed the trial court. Petitioner has failed to establish that such finding by the trial court and affirmance by the Court of Appeals conflicts with any decisions of other courts of appeal or of this Court. Nor has Petitioner established that the trial court's findings and affirmation by the Court of Appeals raises issues of sufficient importance that this Court should grant certiorari.

The evidence clearly established that the Petitioner had violated its NPDES Permit. The trial court in turn quite

properly ordered compliance with that Permit. Compliance with the Permit requires that the City of Allen Park separate the sewers within its jurisdiction. It is those sewers that were found to be responsible for the raw sewage flows into the Le Blanc Drain. The Sixth Circuit appears to have viewed this as essentially a permit enforcement action in issuing a summary affirmance of the trial court. Given the state of the evidence, Petitioner simply asks this Court to review the evidence and discuss specific facts. This is not the purpose of a certiorari. *United States* v *Johnson*, 268 US 220 (1924).

A. THE CITY OF ALLEN PARK CAUSES THE UNLAWFUL DISCHARGE OF POLLUTANTS TO THE WATERS OF THE STATE OF MICHIGAN IN VIOLATION OF STATE AND FEDERAL LAW.

The Federal Water Pollution Control Act (hereinafter FWPCA) § 301(a), 33 USC § 1311(a) makes unlawful the discharge of any pollutant by any person except where a permit is issued under the National Pollutant Discharge Elimination System created in § 402 of the FWPCA, 33 USC § 1342. Further, § 402(b), of the FWPCA, 33 USC 1342(b) provides that states may administer their own permit program in lieu of the federal program upon a showing that the state program meets certain federal standards.

The State of Michigan has met such standards and has authority from the United States Environmental Protection Agency (hereinafter "EPA") to administer its own water pollution permit program. The Michigan Water Resources Commission Act (hereinafter WRCA) provides the Water Resources Commission authority to regulate unlawful discharges into waters of the state. The permit issued in this case NPDES Permit No. MI-0026204 was issued by the WRC pursuant to State authority and is governed by state law.

Once a state permit program has been approved, a separate and independent state authority to administer the NPDES program is created and the federal program is suspended within the state. *Shell Oil Company* v *Train*, 585 F2d 408 (CA 9 1978), *Mianus River Preservation Committee* v *Administrator* 541 F2d 899 (Second Circuit 1976). Thus, with respect to the application and interpretation of NDPES Permit No. MI-0026204 and other discharge matters in this case, state law applies.

Thus the argument by the City of Allen Park regarding their status under the Permit, which is based on federal law and interpretations, (Petition pages 10-12), is inapplicable. Since state law arguably provides for more stringent regulation, i.e., direct and indirect causes of pollution and not less stringent regulation than federal law, state law is clearly applicable in this instance. See, FWPCA § 510, 33 USC § 1370, *EPA* v *California*, 426 US 200 (1975).

1. ALLEN PARK IS A DISCHARGER AS DEFINED BY STATE LAW.

Section 6a of the WRCA, MCLA 323.6(a) makes unlawful the discharge, *directly or indirectly* into the waters of the State, any substance which is or may become injurious to the public health, safety or welfare. Further, § 6b provides that the discharge of any raw sewage of human origin, directly or indirectly into waters of the State, is prima facia evidence of a violation of the act by the *municipality in which the discharge originated.* Section 7(1) of the WRCA further prohibits any discharge in the waters of the State without a permit. The legislative scheme is clear. It controls the discharges of raw sewage from combined sewers in the municipalities involved in this case, including those by Petitioner. Petitioner acknowledges that its sewage is discharged to the river in their Petition, (see pages 2 and 3 of the Petition, A 73, 74). Whether

Petitioner owns, operates or in any other way controls the point source of its discharges is immaterial. Allen Park is the municipality in which the discharge "originates".

2. ALLEN PARK IS AN INTEGRAL PART OF THE LE BLANC TILE DRAINAGE DISTRICT.

The Permit was issued to the Wayne County Drain Commissioner who acts on behalf of the Le Blanc Tile Drainage District. The Le Blanc Tile Drainage District serves Allen Park, Lincoln Park and Taylor. It is a public corporate body created pursuant to the State Drain Code of 1956 (hereinafter Drain Code) 1956 PA 40, § 463, MCLA 280.463. In fact, Petitioner was one of the communities which petitioned for creation of that Drainage District in order to protect the public health by abating the pollution caused by its raw sewage discharge. (A. 17a) Allen Park is one of the communities assessed for the costs related to the Drainage District and therefore in accordance with § 467 of the Drain Code, MCLA 280.467, it is an integral part of the Drainage District. The violation of the Permit by the Drainage District was directly attributable to the refusal of Allen Park to comply with the conditions of that Permit. Thus, Petitioner is a discharger in fact and in law under the circumstances of this case. Petitioner has failed to show that such a finding conflicts with any decision of the courts of appeal or of this Court. Under a fair reading of the *Montgomery Coalition* v *Fri* case; 366 F Supp 261 (DCDC 1973) the Petitioner herein would clearly be a discharger if one were to apply the facts of this case to the legal analysis contained in that case.

Nor has Petitioner established that the finding in this case raise issues of sufficient importance to warrant this Court from granting the Petition. This case is simply a permit enforcement action most appropriately analyzed on its own facts. It does not raise any important general issues.

B. THE COURTS BELOW APPLIED THE PROPER STANDARD OF JUDICIAL REVIEW TO THE AGENCY REQUIREMENT FOR SEPARATION OF SEWERS.

Petitioner's second argument consists of rather disjointed and obscure claims that some other EPA records or files should have been admitted into evidence. There is no doubt that the DNR desired that the Alternate 1 Project be completed since it was incorporated by reference in the Permit. This litigation concerns the enforcement of the Permit. (A. 70) All the parties, Petitioner included, approved the construction of the sewer separation project provided for in the Alternate 1 Project.

Petitioner claims that the trial court here relied upon post hoc rationalizations for agency action such as were described in the case of *Citizens To Preserve Overton Park* v *Volpe*, 401 US 402 (1971). This claim is absurd since the action in this litigation was supported by specific studies of pollution and related circumstances in the north branch of the Ecorse Creek which preceded the issuance of the approval of the Alternate 1 Project and the NDPES Permit by some nine to ten years. They are all part of the record in the trial and the facility planning process required for receipt of federal grant funds. All these studies were subject to public scrutiny and opportunity for public hearing.

Nor is this situation analogous to that involved in the *Ford Motor Company* v *EPA* case; 567 F2d 661 (CA 6, 1977). In that case the EPA attempted to veto a state-issued NPDES Permit, pursuant to authority, but failed to substantiate its veto until some ten months after it had taken place. The Sixth Circuit found this unacceptable and properly so. Again, the facts of this case disclose that there existed a complete and comprehensive record of the planning and evaluation of the impacts of this project which preceded the trial by more than ten years.

C. THE COURTS BELOW PROPERLY APPLIED THE "ARBITRARY AND CAPRICIOUS" STANDARD OF JUDICIAL REVIEW AND PETITIONER WAS SIMPLY UNABLE TO PROVIDE ANY CREDIBLE EVIDENCE TO DEMONSTRATE THAT "ARBITRARINESS OR CAPRICIOUSNESS".

Petitioner's third reason for granting the writ founders on a very substantial confusion of legal principles. Petitioner fails to understand that this case rises or falls on application of a standard of judicial review and not on standards of relevancy to be applied under the rules of evidence. The rules of evidence would relate to presentation of evidence in a hearing on the matter of arbitrariness or capriciousness, i.e., whether the agency had considered all relevant factors related to the particular agency action. Petitioner's problem is simply that it was unable to provide any evidence to suggest that the actions of the agency were arbitrary and capricious under this standard.

D. THE SEWER SEPARATION PROJECT AT ISSUE HERE WAS PROPERLY EVALUATED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

Petitioner suggests that the United States Environmental Protection Agency failed to properly review the Element 2 Facility Plan, Alternate 1 Project under the National Environmental Policy Act (hereinafter "NEPA"). They further claim that the doctrine of laches should not have been applied under the circumstances of this case.

The district court's ruling that laches barred evidence on the issue of the adequacy of the negative declaration issued

by U.S. EPA was proper under the facts of this case. Laches is proper here because the City of Allen Park unreasonably delayed in asserting its claims. In addition, the other communities of Lincoln Park and Taylor and the regulatory agencies were prejudiced by this unreasonable delay. The lower court properly applied the legal concept of laches to the facts of this case. Petitioner fails to show any conflict of cases and fails to raise any substantial legal issues in this regard. They simply seek another avenue of normal appellate review.

The negative declaration was released on March 14, 1977. The filing of the counter-claim asserting violation of NEPA by issuance of the negative declaration occurred on April 10, 1980. Thus, there was more than three years delay on the part of the City of Allen Park in raising its NEPA claims. This delay was totally unreasonable.

It is interesting to note that the City of Allen Park filed a state court claim related to this matter against the Wayne County Drain Commissioner in August of 1978. The thrust of that action, which was settled before trial, was a challenge of the Alternate 1 Project on financial grounds. It did not raise environmental objections. Moreover, the City of Allen Park's own City Engineer helped prepare the Element 2 Final Facility Plan. There is no basis for the City's claim that they were unaware of the impacts of construction upon the City of Allen Park.

Application of laches here was also supported because of a specific showing of prejudice to the opposing parties. The neighboring cities of Lincoln Park and Taylor undertook construction and abatement activities where are an integral part of the entire water pollution abatement scheme for the Le Blanc Drain. At time of trial, these communities had completed approximately 90% of their segments of the project.

Without the completion of the Allen Park segment of the project, much of the environmental benefits of the project in Lincoln Park and Taylor are negated. Further, the storm water in Taylor would continue to contain sewage flowing from Allen Park and odor problems from sewage sludge accumulating in their retention basin within Taylor might result. The cities of Lincoln Park and Taylor anticipated a reduction in their costs of wastewater treatment at the Wyandotte Wastewater Treatment Plant because of the installation of their project. Failure of Allen Park to remove its combined sewage would prevent Lincoln Park and Taylor from realizing their share of the reduction of these costs. Clearly Allen Park's unreasonable delay in raising its NPEA claim injures the public in general as well as EPA, the DNR and the communities of Lincoln Park and Taylor. Together these agencies and communities have spent millions of dollars to construct a sewer project, the environmental and economic benefits of which would be significantly undermined by Allen Park's failure to construct their portion.

E. PETITIONER FAILED TO PRODUCE ANY EVIDENCE TO ESTABLISH THAT THE U.S. EPA EVALUATION UNDER NEPA WAS ARBITRARY AND CAPRICIOUS.

Even if the doctrine of laches had not been applied to Petitioner's NEPA claims, Petitioner failed to present evidence that the EPA's negative declaration and environmental assessment was improper. An EPA decision to issue a negative declaration and environmental assessment rather than prepare an extensive and voluminous environmental impact statement (hereinafter "EIS") will be reversed by a court only if it is arbitrary and capricious. *Aertsen* v *Landrieu*, 637 F2d 12, 18 (CA 1 1980); *Nucleus of Chicago Homeowners Association* v *Lynn*, 524 F2d 225, 229-230 (CA 7 1975), *cert denied*, 524

US 967 (1976); *Bosco* v *Beck*, 475 F Supp 1029 (D.N.J. 1979), aff'd, 614 F2d 769 (CA 3 1980), *cert denied* 449 US 822. In addition, see *Kleppe* v *Sierra Club*, 427 US 390, 412 (1976).

The threshold test of whether a project is a major federal action "significantly affecting the quality of the human environment" is met when plaintiff alleges facts which, if true, show that the proposed project would materially degrade any aspect of the environmental quality. *City of Davis* v *Coleman*, 521 F2d 661, 673 (CA 9 1975); *Environmental Defense Fund* v *Armstrong*, 487 F2d 814, 817, (CA 9 1973), *cert denied*, 416 US 1974 (1974). Applying that test to this case, if the Allen Park Sewer Separation Project will materially degrade the quality of the human environment, an EIS should be prepared. However, Petitioner was unable to set forth any facts which, if true, demonstrate that the project required an EIS. Viewing the matter in the long run, the sewer separation project materially improves the quality of the human environment by abating the raw sewage discharge problems to the north branch of the Ecorse Creek.

Petitioner claimed material degradation to the environment from effects of the construction process. The EPA-issued environmental assessment recognized, however, that the environmental impacts would be limited to the cities involved and would be due to construction. While they might cause inconvenience to the residents for a short period of time, it has been held that there is no need to prepare an EIS when there is no long-term impact, no permanent commitment of national resource and no degradation of a traditional environmental asset. No EIS is required where a party merely shows short-term personal inconvenience and short-term economic disruptions. That is precisely the situation involved in this case. Petitioner further fails to present any evidence that the

negative declaration and environmental impact assessment were not prepared by proper U.S. EPA personnel. They were authored by the U.S. EPA. In sum, Petitioner failed to show any inadequacies in EPA's environmental impact assessment such that its decision not to prepare an EIS was arbitrary and capricious. Petitioner fails to show or demonstrate any conflict between this case and any case of the courts of appeal or this Court. Nor does it show any significant legal issue raised by this case.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari to the United States Court of Appeal for the Sixth Circuit, filed by the City of Allen Park should be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Stewart H. Freeman
Assistant Attorney General
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Dated: March 26, 1982

Appendix

RESPONDENT'S APPENDIX

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SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311.

Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 1342.

Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit

program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

323.6

Sec. 6. (a) It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety or welfare; or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters; or which is or may become injurious to the value or utility of

riparian lands; or which is or may become injurious to livestock, wild animals, birds, fish, aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.

(b) The discharge of any raw sewage of human origin, directly or indirectly into any of the waters of the state shall be considered prima facie evidence of a violation of this section by the municipality in which the discharge originated unless the discharge shall have been permitted by an order or rule of the commission. If the discharge is not the subject of a valid permit issued by the commission, a municipality responsible for the discharge shall be subject only to the remedies provided in section 7.[1] If the discharge is the subject of a valid permit issued by the commission pursuant to section 7, and is in violation thereof, a municipality responsible for the discharge shall be subject to the penalties prescribed in section 10.[2]

(c) A violation of a provision of this section shall be prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this act may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction.

323.7

Sec. 7. (1) After April 15, 1973, a person shall not discharge any waste or waste effluent into the waters of this state unless he is in possession of a valid permit therefor from the commission. Compliance with the terms of an outstanding order of determination or final order of determination or stipulation with the commission that is in effect on April 15, 1973, shall be deemed to meet the requirements of this section until the commission issues its permit. The commission shall

condition the continued validity of a permit upon the permittee's accomplishment of such effluent requirements as the commission deems necessary to prevent unlawful pollution by such dates as the commission deems to be reasonable and necessary and to assure compliance with applicable federal law and regulations. If the commission finds that the terms of a permit have been, are being, or may be violated, it may revoke the permit or grant the permittee a reasonable period of time in which to comply with the permit. The commission shall reissue a revoked permit upon a showing satisfactory to the commission that the permittee has corrected the violation by providing the necessary collection or treatment facilities and has adequately arranged for their operation.

(2) Whenever in the opinion of the commission a person is causing or is about to cause unlawful pollution of the waters of this state, the commission may notify the alleged offender of its determination. The notice shall contain, in addition to a statement of the specific violation which the commission believes to exist, a proposed permit or other action which it deems appropriate to assure timely correction of the problem and shall set a date for a hearing on the facts and proposed action involved, the hearing to be scheduled not less than 4 weeks nor more than 8 weeks from the date of the notice of determination. Extensions of the date of hearing may be granted by the commission or on request. At the hearing, any interested party may appear, present witnesses, and submit evidence. A person who has been served with a notice of determination may file a written answer thereto before the date set for hearing or at the hearing may appear and present oral or written testimony and evidence on the charges and proposed requirements for abatement of pollution contained therein. If a person served with the notice of determination agrees with the terms of the proposed permit and period of time for abatement of polluution which the commission deems necessary and notifies the commission thereof before the date

set for hearing, disposition of the case may be made with the approval of the commission by issuance of a permit without further hearing. The permit approved and issued by the commission following the hearing as authorized by this section shall be conclusive, unless reviewed in accordance with Act No. 306 of the Public Acts of 1969, as amended,[1] in the circuit court for the county of Ingham, for the county in which the person resides or for the county in which the violation occurred, upon petition therefor filed within 15 days after issuance of the permit to the person.

280.463

Sec. 463. When it is necessary for the public health to locate, establish, and construct a county drain, then a petition therefor may be filed with the county drain commissioner signed by 2 or more public corporations which will be subject to assessments to pay the cost thereof. The petition shall state that it is filed pursuant to this chapter and shall describe the location and route of the proposed drain sufficiently to determine with reasonable certainty the areas to be drained thereby. Within 20 days after the petition is filed, the county drain commissioner shall notify all public corporations which may be subject to an assessment or in which are located any of the areas to be drained, as described in the petition, that a petition was filed. Attached to the petition shall be a certified copy of the resolution of the governing body of each signer authorizing the affixing of its signature thereto. The petition may be filed in more than 1 counterpart. For a petition filed by a county, the county board of commissioners shall authorize its execution, and for a petition filed by the state, the state highway commission shall so act. As provided in section 423[1] an order of determination of the water resources commission shall also serve as a petition made pursuant to this chapter.

Sec. 464. There is created for each project petitioned for under the provisions of this chapter, a drainage board to consist of the drain commissioner of the county, the chairman of the county board of supervisors and the chairman of the board of county auditors. If there is no board of county auditors in any such county, then the chairman of the finance committee of the board of supervisors shall act as a member of the drainage board, and if there is neither a board of county auditors nor finance committee, then the chairman of the board of supervisors shall select from time to time 1 member of the board of supervisors to act as a member of the drainage board. If a supervisor member of the drainage board, as provided in this section or section 487,[1] is interested in a project petitioned for under the provisions of this chapter, by reason of his holding an elected or appointed office in a public corporation to be assessed for the cost of the project, he is disqualified to act as a member of the drainage board with respect to the project. In such case the vice-chairman or chairman pro tempore of the board of supervisors or of the finance committee of the board of supervisors, if not also disqualified, shall act as such member. If the vice-chairman or chairman pro tempore is disqualified, the drain commissioner of the county shall designate a member of the board of supervisors who is not so disqualified to act as a member of the drainage board for the project. The chairman of the board of supervisors and any member of a board of supervisors serving on the drainage board shall receive such compensation, mileage and expenses as shall be provided by the drainage board except that such compensation shall not exceed $25.00 per diem exclusive of mileage and expenses for attendance at drainage board meetings. The county drain commissioner shall be chairman of the drainage board. He shall keep minutes of the

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[1] Section 280.487.

proceedings of the drainage board and all records and files of the board shall be kept in his office. In counties of less than 500,000 population the commissioner shall be paid the same compensation as other members of the drainage board.

280.467

Sec. 467. The drainage board, at its first meeting, shall consider the petition for the project and make a tentative determination as to the sufficiency of the petition and the practicability of the proposed drain, and shall further make a tentative determination of the public corporations to be assessed. The drainage board shall give a name to the drain and to the drainage district. The district shall be composed of the public corporations to be assessed for the cost of the project. After the drainage board has made the determination it shall fix a time, date, and place it will meet to hear objections to the proposed drain and the petition for the drain, and to the matter of assessing the cost of the drain to the designated public corporations. Notice of the hearing shall be published twice in the county by inserting the notice in at least 1 newspaper published in the county, designated by the drainage board, with the first publication to be not less than 20 days before the time of the hearing. The notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that a notice to the state shall be sent to the state highway director and a notice to a county shall be sent to both the county clerk and the county road commission. The mailing shall be made not less than 20 days before the time of the hearing. The notice shall be signed by the chairperson and proof of the publication and mailing of the notice shall be filed in his or her office. The drainage board may provide a form to be substantially followed in the giving of the notice. After the hearing, the drainage board shall make a determination as

to the sufficiency of the petition, the practicability of the drain, whether the drain should be constructed, and if so, the public corporations to be assessed, and shall issue its order accordingly. The order shall be known as the final order of determination. A public corporation shall not be eliminated from, or added to, those tentatively determined to be assessed without a rehearing after notice.

Permit No. MI 0026204

MICHIGAN WATER RESOURCES COMMISSION
AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et seq; the "Act"), Michigan Act 98, Public Acts of 1913, as amended, being sections 325.201 through 325.213 of the Compiled Laws of Michigan, and the Michigan Water Resources Commission Act, as amended, (Act 245, Public Acts of 1929, as amended, being sections 323.1 through 323.13 of the Compiled Laws of Michigan, the "Michigan Act"),

the Wayne County Drain Commissioner acting for and on behalf of the LeBlanc Tile Drainage District, serving the Cities of Allen Park, Lincoln Park and Taylor

is required to utilize, to the maximum extent practicable, available receiving sewerage system transportation capabilities for the delivery of combined sewage to treatment facilities, and;

for an interim period during which an effective combined sewer overflow control program is to be implemented as established herein, the permittee is authorized to discharge

combined sewage flows in excess of such available transportation and treatment capabilities from outfalls, at locations, and to receiving waters as listed below in accordance with the conditions set forth in Parts I and II hereof.

OUTFALL	LOCATION	RECEIVING WATER
001	LeBlanc Tile Drain, City of Lincoln Park (Capitol Avenue-east of River Drive)	North Branch of the Ecorse Creek

This permit shall become effective on the date of issuance.

This permit and the authorization to discharge shall expire at midnight, March 31, 1982. In order to receive authorization to discharge beyond the date of expiration, the permittee shall submit such information and forms as are required by the Michigan Water Resources Commission no later than 180 days prior to the date of expiration.

Signed this 20th day of January 1978, by the Michigan Water Resources Commission.

Robert J. Courchaine /s/

Robert J. Courchaine
Executive Secretary

PERMIT CONDITIONS

PART I

A. Discharges From Combined Sewer Systems

The Wayne County Drain Commissioner as agent for the LeBlanc Tile Drainage District shall attain control of the combined sewer overflows from the permittees combined sewer system at outfall 001 on or before March 31, 1982.

The Element 2 Report for the Combined Sewer Areas of the Ecorse Creek reviewed various alternatives for the abatement of pollution from this overflow and concluded that sewer separation is to be accomplished. The sewer separation program has been designed and has been approved for construction. At the time of the issuance of this permit, the permittee had received a Step III grant offer to construct new sewers. Accordingly, the permittee is required to complete construction of the sewer separation program and to perform additional sewer studies and rehabilitation and provide additional retention facilities in order to eliminate the discharge of sewage from outfall 001.

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES
WATER RESOURCES COMMISSION

IN THE MATTER OF: NPDES PERMIT NO. MI 0026204
WRC No.: NV-11-79-01-0139

The Wayne County Drain Commissioner,
as agent for the LeBlanc Tile
Drainage District; and the City of Allen Park

NOTICE OF VIOLATION

TO: LeBlanc Tile Drainage District
900 W. Lafayette Blvd.
Detroit, MI 48226

Attn: Mr. Charles N. Youngblood
Wayne County Drain Commissioner

The City of Allen Park
16850 Southfield Road
Allen Park, MI 48101

Attn: Mr. Frank J. Lada, Mayor

PLEASE BE ADVISED that we have sufficient information to believe that the Wayne County Drain Commissioner, as agent for the LeBlanc Tile Drainage District, and the City of Allen Park, have violated the terms and conditions of National Pollutant Discharge Elimination System Permit No. MI 0026204, issued on January 20, 1978.

PURSUANT TO THE TERMS of the aforementioned permit (Part I, Section A), the Wayne County Drain Commissioner, as agent for the LeBlanc Tile Drainage District, serving the City of Allen Park, shall attain control of combined sewer overflows at outfall 001 by no later than March 31, 1982. It is acknowledged in the permit that a Step III grant offer has been tendered for federal and state assistance for implementing the necessary construction program.

FURTHER, PURSUANT to a letter dated December 14, 1978, staff of the United States Environmental Protection Agency notified the Wayne County Drain Commissioner and the City of Allen Park that, in accordance with the requirements of 40 CFR 35.930-4 (b), the Wayne County Drain Commissioner must commit to a schedule by which the various segments of the project will be accomplished.

FURTHER, by letter dated January 31, 1979, the Wayne County Drain Commissioner committed to initiating construction of the Allen Park segment of the project by March 1, 1980, and completing construction of the same by March 1, 1982, in compliance with the NPDES permit.

BE ADVISED that the Department of Natural Resources' projected schedule for completion of the Allen Park segment shows that, in order to begin construction by March 31, 1980, and complete construction by March 31, 1982, bid advertisement for the Allen Park segment must have begun by no later than October 30, 1979.

BE FURTHER ADVISED that Departmental records show that, to date, the Wayne County Drain Commissioner and the City of Allen Park have failed to undertake the necessary bid advertisement procedures for the Allen Park segment.

BE FURTHER ADVISED that the failure of the Wayne County Drain Commissioner and the City of Allen Park to initiate actions leading to completion of construction by March 31, 1982, is considered to be a violation of NPDES Permit No. MI 0026204.

IT IS THEREFORE ORDERED that the Wayne County Drain Commissioner and the City of Allen Park submit to the Chief of the Water Quality Division a detailed program whereby combined sewer overflows from outfall 001 shall be controlled. Said program shall be submitted by no later than December 14, 1979, and shall include the following:

1. an explanation for the failure to implement program requirements necessary to commence construction by March 1, 1980;

2. a detailed program leading to the initiation of said construction; and

3. an expedited schedule of construction leading to the completion of construction by March 31, 1982.

BE ADVISED that past and continued failure to comply with the terms of the NPDES permit and/or the provisions of this Notice of Violation will result in further enforcement action, which may include revocation of your NPDES per-

mit, imposition of a ban on sewer construction, and/or litigation for court-order construction with or without grant funds and the full penalties provided for under law.

DEPARTMENT OF
NATURAL RESOURCES

Jack D. Bails /s/

Jack D. Bails, Chief
Environmental Enforcement Division

Dated Issued: November 28, 1979

WATER RESOURCES
COMMISSION
DEPARTMENT OF
NATURAL RESOURCES

Robert J. Courchaine /s/

Robert J. Courchaine
Executive Secretary

Frank Baldwin /s/

BY: Frank Baldwin, Chief
Surface Water Compliance Section

ADDRESS FOR FURTHER
CORRESPONDANCE

Frank Baldwin, Chief
Surface Water Compliance Section
Water Quality Division
P.O. Box 30028
Lansing, Michigan 48909

Telephone: (517) 373-1947

City of Allen Park
County of Wayne, Michigan

Minutes of a Regular meeting of the City Council of the City of Allen Park, County of Wayne, Michigan, held in the City Hall in said City on the 14th day of June, 1977, at 7:30 oclock p.m., Eastern Daylight Time.

PRESENT: Councilmen Demeter, Duda, Pretty, Rourke and Mayor Lada.

ABSENT: Councilmen Burger; Councilman Richards, excused.

The following preamble and resolution were offered by Councilman Duda and supported by Councilman Pretty:

WHEREAS, there are certain areas within the Cities of Allen Park, Dearborn Heights, Lincoln Park and Taylor where drainage is now inadequate and flooding and polluted conditions exist, and it is immediately necessary for the public health to make certain storm and sanitary drainage improvements; and

WHEREAS, said proposed drainage improvements are necessary in order to protect and preserve the public health by abating pollution and providing adequate drainage for certain areas of the foregoing communities, and the general description, location and route thereof are as set out in the petition attached hereto; and

WHEREAS, in the opinion of this Council, said drainage improvements being necessary for the public health, the entire cost thereof should be assessed against the foregoing public corporations for benefits to public health, except for

such part of the cost as may be allocated to the State of Michigan and the County of Wayne for drainage of highways; and

WHEREAS, Chapter 20 of Act 40, Public Acts of Michigan, 1956, as amended (the Drain Code of 1956) provides a feasible and legal method of financing the cost of said drainage improvements where the same are necessary for public health; and

WHEREAS, this City has already petitioned the Wayne County Drain Commission under the aforesaid Chapter 20 for the making of said improvements as a part of a broader program to improve the North Branch Ecorse Creek Drain, but in order to expedite the project and assure receipt of federal and state grants, it is necessary to petition for the making of said improvements as a separate project;

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The City Council, for and on behalf of the City of Allen Park, does hereby consent to and approve the making and financing of the drainage improvements as described generally in the preamble hereto, pursuant to and in accordance with the provisions of Chapter 20 of Act 40, Public Acts of Michigan, 1956, as amended (the Drain Code).

2. The City Council does hereby determine and declare that said drainage improvements as described generally in the preamble hereto are vitally necessary to preserve and protect the public health by abating pollution and providing adequate drainage.

3. The Mayor and City Clerk are hereby authorized and directed to sign, for and on behalf of the City of Allen Park, the attached petition directed to the Drain Commissioner of the County of Wayne, Michigan, requesting the making of the drainage improvements as generally described in the preamble

hereto, pursuant to and in accordance with the provisions of Chapter 20 of Act 40, Public Acts of Michigan, 1956, as amended.

4. In the event the improvements herein authorized to be petitioned for are for any reason not financed or constructed pursuant to the petition duly filed, the City shall assume and pay its share of all costs incurred by the statutory drainage board in acting upon said petition pursuant to the requirements of the law.

5. All resolutions and parts of resolutions insofar as they conflict with the provisions of this resolution be and the same hereby are rescinded, but only to the extent of such conflict. All actions approving the broader program of improvement of the North Branch Ecorse Creek Drain are not rescinded, but such program is hereby ratified as reduced by the elimination of the improvements herein petitioned for.

AYES: Councilmen Demeter, Duda, Pretty, Rourke and Mayor Lada.

NAYS: Councilmen None.

RESOLUTION DECLARED ADOPTED.

Bernice Weiss /s/

Bernice Weiss, City Clerk

I hereby certify that the foregoing is a true and complete copy of a resolution adopted by the City Council of the City of Allen Park, County of Wayne, State of Michigan, at a Regular meeting held on June 14, 1977, and that public notice of said meeting was given pursuant to and in full compliance with Act No. 267, Public Acts of Michigan, 1976.

Bernice Weiss /s/

Bernice Weiss, City Clerk

(Direct Examination) (T. p. 60)

Q (By Mr. Emery): Mr. Sprow, getting back to our prior discussion, can you describe for me what the nature of the pollution problems were that you were faced with when you commenced your employment with the Public Health Department at that time and later the DNR?

A The problem, water pollution problems, were basically due to combined sewer system overflows which contained untreated raw sewage. There were numerous types of floating materials into the discharge which people complained about there are bacteria and were bacteria in the discharge that we and local citizens were concerned about.

These certain types of water-borne disease, such as typhoid, cholera, dysentery, hepatitis, can all be transmitted through contaminated water.

There is also a problem of substances that are discharged through combined sewer systems in wet weather which exert an unsatisfactory biochemical oxygen demand. The biochemical oxygen demand acts to deplete the dissolved oxygen in the water of Ecorse Creek to an (T. p. 61) unsatisfactory level, which results in fish kills because of inadequately dissolved oxygen, and also results in the anacrobic decomposition of the organic materials which are discharged, which results in odors and generally inadequate water quality problems.

Q By "anaerobic," are you referring to a phenomenon where decomposition takes place in the absence of oxygen?

A Yes. It's a different kind of decomposition process. It is noted for its release of gas bubbles and odors similar to hydrogen sulphide.

• • •

Direct Examination (T. p. 324)

Q (By Mr. Emery): Some of the discharge points above or upstream of the LeBlanc Drain show high fecal coliform counts. How can you account for that occurrence?

A (By Mr. Woods): From the combined sewage that we saw bypassing above Mill Street, and there may be other points upstream also that we did not notice.

Q With respect to the actual discharge from the LeBlanc Drain into the north branch of Ecorse Creek, what conclusion do you make as to the quality of that discharge with respect to fecal coliform discharge?

(T. p. 325)

A We noted very high levels of fecal coliform.

Q And are you familiar with the Michigan Water Quality Standard?

A Yes, I am.

Q Do you know what the allowable amount of fecal coliform is or partial body contact?

A It is 1,000 counts per 100 milliliters, and that is to be taken as a geometric average of five consecutive samples taken within a 30-day period.

Q Is the fecal coliform data shown in Tables 1 and 2 of Exhibit 17 stated in the same quantities, terminology, as the 1,000 counts per milliliters?

A Yes, it is.

Q So a direct comparison in terms of quantities can be made from the data to the water quality standard?

A That's correct.

• • •

(Mr. Willson . . . T. p. 528)

The result of the sample, was basically, there was zero point zero point oxygen in that mud water interface, which is one of the strongest precluders of a balanced or a well balanced indigenous community in the sediments of the Ecorse River.

In fact, the thing that was most striking about the Benthic, the bottom community, the community of animals that inhabit the bottom, was that there was only type of animal there—we refer to that as a unispec community. It was entirely composed of sludge worms.

This is unique because there are very (T. p. 529) few waters that have environmental conditions severe enough to reduce all other forms of bottom-growing animal rights to simply one—sludge worms and only sludge worms. Even in the worse conditions you will have very similar pollution-tolerant midgets, chironomus—c-h-i-r-o-n-o-m-u-s—I am not sure that is right but that is close—which can tolerate extremely low levels of oxygen—and procladeus, which is also a very pollution-tolerant midget, which its food source is sludge worms. It is commonly associated in very grossly polluted situations.

And what we had in the Benthic sludge of the lower Ecorse River is one that could not even support those tolerant midgets. And this was basically, and in my mind, due to the extreme oxygen demand and the absence of oxygen in that discrete mud water interface that wouldn't even allow these animals to occupy that habitate, along with the fact that the seds apparently were highly impregnated with oil, which has a highly debilitating effect on animal life.

Q (By Mr. Emery): Have you ever observed in your experience a river that was in worse condition than the north branch of the Ecorse Creek?

A With respect to the nature and extent or the severe limitation of the Benthic community to that of strictly sludge worms, I don't think I have. It is one of the most severely or grossly degraded stream sections that I have had the occasion (T. p. 530) to document or survey over my thirteen years with the Department of Natural Resources.

Q And did you take any special precautions in working during your sample taking and so on in the river?

A Yes. I felt that it would be prudent to wear rubber gloves while I was working on the sample taking.

Q What was your concern with respect to rubber gloves?

A Bacteriological contamination.

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Opposition

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Supreme Court, U.S.
FILED
APR 8 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1555

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF ALLEN PARK, PETITIONER
v.
STATE OF MICHIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a city is subject to the permit requirements of Section 301 of the Clean Water Act, 33 U.S.C. 1311(a), when that city's sewage, which generally is treated at a publicly-owned plant, occasionally overflows untreated from a combined stormwater and wastewater sewer into a creek.

2. Whether the district court abused its discretion in applying the equitable doctrine of laches to bar petitioner's suit, filed three years after the EPA decided not to prepare an environmental impact statement for a sewer separation construction project in three Michigan communities, because the delay was unexplained, construction was substantially completed in the two other affected communities, and substantial funds had been spent on the project by the EPA and the state and local governments.

3. Whether the district court erred in restricting its review of whether the decision to fund the project in this case was arbitrary or capricious to the record before EPA at the time the agency made its decision.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 10) is not reported. The opinion of the district court (Pet. App. 13-49) is reported at 501 F. Supp. 1007.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1981. A petition for rehearing was denied on November 23, 1981 (Pet. App. 9). The petition for a writ of certiorari was filed on February 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the water quality of the North Branch of the Ecorse Creek in Michigan. Combined sewers in three Michigan cities, Lincoln Park, petitioner Allen Park and Taylor, generally carry a mixture of raw sewage, storm water, and other wastewater generated by these cities

through various stages to the Wayne County Wyandotte Wastewater Treatment Plant (Pet. App. 13, 16).

The system has problems during wet weather when flows within the combined sewer system are high. If the system's capacity is exceeded, the untreated domestic sanitary sewage and stormwater runoff is occasionally discharged into the North Branch of the Ecorse Creek before reaching the Wyandotte treatment plant (Pet. App. 16-17). These periodic discharges have a documented, devastating effect on the water quality of the Ecorse Creek (*id.* at 14).

In November 1970, the Michigan Department of Natural Resources (DNR) ordered the communities within the Ecorse Creek Basin to reduce the pollution problem. The Wayne County Drain Commissioner then authorized a study of the problem (Pet. App. 14). Following public hearings (see *id.* at 38, 68), a study was released; it evaluated three alternative projects on the basis of contribution to water quality goals, public acceptability, environmental impact, and implementation capability. Based on cost-effectiveness, the study recommended selection of "alternative one," which required construction of a new system of sewers in Allen Park, Lincoln Park, and Taylor in order to separate sanitary sewage from storm runoff. Under this alternative, only storm surface runoff would be released to Ecorse Creek, thereby eliminating raw sewage discharge (*id.* at 14-15).

The recommendation of alternative one was thereafter endorsed by all interested parties, including petitioner Allen Park (Pet. App. 32 n.10). Indeed, the Allen Park City Engineer was a participant in the preparation of the plan (*ibid.*). The responsible state agency formally selected alternative one and then EPA approved the selection of alternative one (*id.* at 15-16).

In accordance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, EPA commenced an environmental review of the proposed project. The agency found that the project would not have a significant adverse environmental impact warranting preparation of an Environmental Impact Statement (Pet. App. 61). The Environmental Impact Appraisal described the various alternatives and stated that, unless some improvements were made in the sewer system, "Ecorse Creek would continue to be the worst polluted stream in the state" (*id.* at 66). The Appraisal endorsed "alternative one" because it "will remove the highest amount of pollution proportional to cost" (*id.* at 68). The only adverse environmental impact from the project discussed was "short term" disruption during construction of the separate sewer system (*ibid.*).

The Agency released its Appraisal on March 14, 1977, and stated that it would not make a final decision on the project until a 15-day comment period had passed (Pet. App. 62). Petitioner filed no objection and the few comments submitted raised no significant objections (*id.* at 31-32). EPA funding for the project was awarded in stages on April 18, 1977, and on September 30, 1977. Under the grant arrangement, EPA provides 75% of the funding, DNR 5%, and the remaining 20% of the cost is allocated among the local government units (*id.* at 18). As a result of these events, the appropriate state agency, in accordance with Section 402(b) of the Clean Water Act, 33 U.S.C. 1342(b), issued a new NPDES permit requiring completion of the construction program and control of discharges into the North Branch of the Ecorse Creek by March 31, 1982 (*id.* at 17-18).[1]

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[1]Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States except in compliance with, *inter alia*, the NPDES permit program established by Section 402, 33 U.S.C. 1342. Section 402(a)(1), 33 U.S.C. 1342(a)(1), authorizes the

On June 14, 1977, petitioner's Council passed a resolution approving the financing of the drain improvement. An agency of Wayne County approved the project as necessary for the public health (Pet. App. 17). That agency also proposed an apportionment of costs which was confirmed, following notice and hearing, on April 26, 1978. Petitioner's apportioned cost was set at approximately 52% of the local share (*id.* at 18).

Bids for the project subsequently received were about twice the amount of the estimates and in August 1978, petitioner filed suit in state court seeking an injunction against the project (Pet. App. 19). That suit challenged the project solely on financial grounds and was settled when the parties agreed to divide the project into two segments (*id.* at 19, 33).

Federal and state grants were thereafter received for construction in the communities other than Allen Park ("Segment I") and, at the time of trial, work in these communities was substantially completed (Pet. App. 19). In order to be able to comply with the NPDES permit, work on Allen Park ("Segment II"), should have been started by March 1, 1980 (*id.* at 19-20). Construction could not begin, however, unless bid advertisements for the Allen Park segment were issued by October 30, 1979. When no advertising was begun, Michigan's DNR issued notice of violation to the City of Allen Park on November 28, 1979 (Pet. App. 20).

Administrator of the EPA to issue a permit for the discharge of any pollutant so long as certain specified requirements of the Act are met. See generally, *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976). Under Section 402(b), 33 U.S.C. 1342(b), the Administrator must approve a state permit program upon a showing by the state of "adequate authority" to operate a permit program. Chapter 323 of the Michigan Water Resources Commission Act, Mich. Comp. Laws §323 (Mich. Stat. Ann. § 3.521 (Callaghan 1977)), provided the DNR with such authority and the Administrator formally approved the operation of the program on October 17, 1973.

2. On December 12, 1979, city residents and a group of construction companies filed separate complaints in the United States District Court for the Eastern District of Michigan against petitioner for its failure to proceed with Segment II of the project. The two cases were consolidated and the DNR and EPA, named as defendants in one of the suits, were realigned as plaintiffs under Fed. R. Civ. P. 21 (Pet. App. 20-21).

Following a bench trial, the district court ordered petitioner to proceed immediately to finance and construct its segment of the project (Pet. App. 11). The court's opinion addressed a number of issues, only three of which are relevant here. First, the court held (Pet. App. 29-30) that the evidence established that petitioner is discharging pollutants into the North Branch of the Ecorse Creek and, because petitioner is not proceeding with construction plans for the sewer separation project, it is failing to comply with the March 31, 1982, construction completion deadline in the NPDES permit. Second, the court held (*id.* at 32, 36) that petitioner was barred by laches or estoppel from arguing that the EPA had violated NEPA by failing to prepare a full environmental impact statement as a basis for challenging EPA's grant approval of the project.[2] Third, it held that petitioner failed to establish that EPA's and DNR's approval of alternative one and granting of funds was arbitrary or capricious (*id.* at 41).

The court of appeals affirmed in a summary order concluding that "the district court committed no reversible error and reached the correct result" (Pet. App. 10).

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[2]Alternatively, the court found that even if laches did not apply, EPA's decision not to prepare an EIS was neither arbitrary nor capricious and the negative declaration and EIA are legally sufficient (*id.* at 36).

ARGUMENT

1. Petitioner argues (Pet. 8-13) that it is not a "discharger" within the meaning of the Clean Water Act and that, accordingly, it is not subject to the Act's NPDES permit requirements. The argument is without merit.

Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits "the discharge of any pollutant" into waters of the United States unless an NPDES permit is obtained under Section 402 of the Act, 33 U.S.C. 1342. "Pollutant," under the Act, includes "sewage" and "sewage sludge"; "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source"; and "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe * * * from which pollutants may be discharged." 33 U.S.C. 1362(6), (12) and (14).

The district court properly found (Pet. App. 26-29) that the city sends a pollutant (sewage) into a point source (a pipe) which, during periods of wet weather, overflows directly into Ecorse Creek, thereby causing an "addition" of a pollutant to a water of the United States. Petitioner's conduct thus violates the Act unless in compliance with the NPDES permit requirements of Section 402, 33 U.S.C. 1342. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 320-321 (1981).[3]

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[3]Allen Park's argument focuses entirely on the definition of "discharger" for purposes of *federal* NPDES permits. In this case, however, Allen Park is contesting the requirements of an NPDES permit issued by the State of Michigan. Michigan requires a permit for discharge of "raw sewage of human origin, directly or indirectly into any of the waters of the state * * * by the municipality in which the discharge originated * * *." Mich. Comp. Laws § 323.6(b) (Mich. Stat. Ann. § 3.526(b) (Callaghan 1977)). The decisions of the courts below thus have an independent state law basis.

Petitioner places primary emphasis on its contention (Pet. 10-12) that EPA's regulations exempt "dischargers" such as it that employ a municipal treatment plant for their sewage. Petitioner is correct that a discharger of sewage that is conveyed into a publicly-owned treatment plant need not obtain a permit, but that exclusion is inapplicable in this case because the regulations specifically retain coverage of discharges, such as combined sewage overflows, which go directly into surface waters *before reaching a treatment plant*. Thus, the exclusion from the permit program "does not apply to * * * discharges through pipes, sewers or other conveyances owned by a state, municipality, or other party *not leading to a treatment works.*" 40 C.F.R. 122.51(c)(2)(iii) (emphasis supplied).[4]

2. Equally without merit is the argument (Pet. 25-30) that the district court ought not to have applied the doctrine of laches to bar petitioner's challenge to the Environmental Impact Appraisal issued in 1977. The record reflects that, in applying the doctrine of laches, the court acted well within the discretion entrusted to it. See *Gardner* v. *Panama Ry.*, 342 U.S. 29, 30-31 (1951) (per curiam). The district court expressly found that petitioner's three-year delay in asserting its claim was unreasonable, that this delay resulted in prejudice to other parties and communities that had begun construction in reliance on petitioner's agreement to participate, and that the public interest in expeditiously upgrading the quality of the Ecorse Creek outweighed petitioner's

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[4]Petitioner's argument (Pet. 7-8) that it cannot be subject to an NPDES permit requirement because it exercises no "control" over the sewage treatment system, under *Montgomery Environmental Coalition* v. *Fri*, 366 F. Supp. 261, 267 (D.D.C. 1973), is similarly misplaced. Allen Park's control over the treatment facilities is irrelevant to the question whether the city sends sewage into United States waters. What is critical is that the city "controls" the discharge by contributing sewage to the overflow.

interest in delaying the project (Pet. App. 32-36). These findings, upheld by the court of appeals, clearly justify the district court's application of laches to petitioner's claim. See *Schiffler* v. *Schlesinger*, 548 F. 2d 96, 103 (3d Cir. 1977); *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164, 1182 (6th Cir. 1972).[5] This factbound issue warrants no further review by this Court.

3. Petitioner's final contention (Pet. 13-24) that the district court improperly refused to admit certain EPA files and improperly denied its offers of proof also lacks merit. It is well settled that, in reviewing agency action, such as the EPA's in this case, under the Administrative Procedure Act, 5 U.S.C. 706, courts are to restrict their review to whether, based on the *administrative* record, the agency action was arbitrary or capricious. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416, 419 (1971).

The administrative record in this case was voluminous. The sewer separation project was the subject of years of scrutiny before it was finally approved by EPA. An initial facility planning study was submitted to the DNR in September 1974; public hearings were held on that plan in December 1974. Revised plans were released in June 1975 and December 1976. Again public hearings were held and the final version of the plan was forwarded to EPA in February 1977. That version contained a full and complete record of the public comments and constitutes the administrative record in this case that was before the district court.

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[5] "It is now settled that the equitable doctrine of laches can apply in the context of environmental litigation." *Save Our Wetlands* v. *U.S. Army Corps of Engineers*, 549 F. 2d 1021, 1026 (5th Cir.), cert. denied, 434 U.S. 836 (1977). See also *Aertsen* v. *Landrieu*, 637 F. 2d 12, 19 (1st Cir. 1980); *Environmental Defense Fund* v. *Alexander*, 614 F. 2d 474, 478 (5th Cir.), cert. denied, 449 U.S. 919 (1980); *Schiffler* v. *Schlesinger, supra*, 548 F. 2d at 104; *City of Rochester* v. *U.S. Postal Service*, 541 F. 2d 967, 977 (2d Cir. 1976).

Based on that record the district court held that the administrative action in this case was completely reasonable (Pet. App. 36-41).

Having failed, despite abundant opportunity, to raise objections during any of the administrative hearings, petitioner sought three years later to have the district court reopen that record for presentation of new evidence. The time to present such evidence, however, had long since passed: "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). See also *FPC* v. *Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 331 (1976). Accordingly, the district court properly excluded petitioner's proffered evidence and thereby confined its review to the record before EPA at the time it approved the project, issued its environmental appraisal, and awarded the grants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

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